Supreme Court, U.S.
FILED

05-531 AUG 10 2005

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Greg L. Carter,

Petitioner

v.

Rebecca Raish

On Petition for Writ of Certiorari
To the Colorado Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Greg L. Carter
Pro Se
1175 S. Huron
Denver, CO 80223
303-871-8803

INTRODUCTORY STATEMENT

The State of Colorado has deprived Petitioner of his child custody and property **without** notice or due process. A child custody judgment was entered without Petitioner's knowledge, notice, or due process. That judgment was subsequently used in another court to quadruple Petitioner's child support, again, without service, notice, or due process. Those judgments were subsequently used to obtain a judgment in a fraudulent conveyance action.

Upon discovery of the judgments Petitioner motioned the court entering the latest of the two judgments to set aside both judgments pursuant to State C.R.C.P. rule 60(b). This motion was denied by a magistrate. A timely motion to "reconsider" that ruling was filed and subsequently lost by the court.

Upon discovery of the lost motion, another motion to "reconsider," and a motion to "review" that ruling by a judge pursuant to State C.R.M. was filed simultaneously. The motion to "reconsider" was denied by the magistrate and the pending motion to "review" was denied by a judge, citing C.A.R. as governing her ruling.

Petitioner timely filed a Notice of Appeal followed by a timely Opening Brief (case no. 03CA2361 /05SC153). The timely filed and lost motion was proven in the Opening Brief and proven in a show cause order, however the appeal was dismissed because the lost and timely filed motion was a motion to "reconsider" and not a motion for "review." The fraudulent conveyance action was appealed in case no. 03CA0671/05SC119 and was upheld based on the latter judgment(s).

QUESTIONS FOR REVIEW

1) Did the Colorado Court of Appeals err in dismissing the appeal for lack of jurisdiction?

2) Did the Colorado Court of Appeals err in upholding the fraudulent conveyance judgment which is based upon a Magistrate's unauthorized ruling?

3) Are the Colorado Appellate Rules and Colorado Rules for Magistrates unconstitutionally vague?

PARTIES

Petitioner:
Greg Carter
1175 S. Huron
Denver, CO 80223

Respondent:
Rebecca Raish
12356 W. Nevada P1. #303
Lakewood, CO 80226

Counsel for Respondent:
John Cimino #14032
925 E. 17th Ave.
Denver, CO 80218
303-830-7135

28 U.S.C. §2403 may apply, and pursuant to Rule 29.4(c), the Colorado Attorney General has been served.

Attorney General / State of Colorado
1525 Sherman St.
5th floor
Denver, CO 80203

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CITATIONS

Colorado Supreme Court-05SC153 and 05SC119
2 East 14th Ave.
Denver, CO 80218

Colorado Court of Appeals-03CA2361 and 03CA0671
2 East 14th Ave.
Denver, CO 80218

Jefferson County Court-96DR2267 and 01CV2338
100 Jefferson County Parkway
Golden, CO 80401

BASIS FOR JURISDICTION

This Petition for Writ of Certiorari, being timely filed after exhausting state remedies, is proper before this court and pursuant to 28 U.S.C. §2254(b).

The order on review was entered on May 16, 2005 (appendix 3) and after a timely filed petition on August 17, 2005, the Clerk of this Court imposed a filing date of October 14, 2005 for this amended petition in booklet form.

REASON FOR GRANTING WRIT

Although rarely granted, this writ is needed and warranted due to its public effect on so many citizens.

The State of Colorado is summarily dismissing thousands of Appeals and in contradiction to the finding of a division of the same court, depriving its citizens of their constitutional right to due process and Appellate review of judgments; depriving them of custody and property rights. See Rule 10 (b) and U.S. Constitution Amend. V and Amend. XIV.

The number of cases and citizens affected by the summary dismissal of their appeal is too numerous to list or determine. The few cases cited herein and the corresponding rulings and conclusions clearly show a public problem, a detrimental void and conflict in the statutes at issue rendering the dismissal of these appeals and the controlling statutes unconstitutional; resulting in denial of fair warning and due process. For these reasons, direction and clarification is warranted from this court.

The Appellate Court dismissed the Appeal on a jurisdictional ground which is a denial of due proc-

ess. The unconstitutionality of that decision was raised in a Petition for Certiorari to the Colorado Supreme Court and was subsequently denied. There is no other court from which relief may be obtained.

The District Court has upheld a judgment which has been deemed void by the Appellate Court. The Appellate Court, refusing to combine the cases, has upheld a subsequent judgment based upon that underlying judgment deemed void by another division of the same court; and the Colorado Supreme Court has denied Certiorari on both rulings.

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SUMMARY OF ARGUMENT

The state courts, attorneys, and litigants alike are confusing Colorado Appellate Rules (C.A.R.) and Colorado Rules for Magistrates (C.R.M.). Numerous cases have been convoluted prompting the appellate courts to make certain determinations regarding appeals taken from a ruling entered by a magistrate where the C.A.R. and the C.R.M. have been misconstrued. See *In re the Marriage of Roosa*, 89 P.3d 524 (Colo. App. 2004); II A ¶ 5 (although statute instructs supreme court to promulgate rules of procedure to govern family law magistrates, to date the supreme court has promulgated only C.R.M., which do not contain a separate section on procedure and address only a few areas of procedure) citing *In re the Marriage of Talbott*, 43 P.3d 734 (Colo. App. 2002).

It is common sense to follow Colorado Appellate Rules (C.A.R.) when seeking an appeal. C.A.R. contain no provision to follow Colorado Rules for Magistrates (C.R.M.) when seeking an appeal from a magistrates ruling.

C.R.M. are to be followed only when the Magistrate had the authority to act "without" consent, otherwise, C.A.R. must be followed. When, as here, an appellant was not involved in the proceeding due to no service or notice of the proceeding he would not know which rule to follow.

The two rules are inept, are not harmonized, and are causing scores of due process problems throughout the State of Colorado.

With the confusion between C.R.M. and C.A.R. the Colorado Court of Appeals has determined that a motion for reconsideration as used in

C.A.R. may be construed as a motion for review as used in C.R.M. See *In re the Marriage of Roosa, supra;* II B ¶ 2 (... order issued in response to father's motion for reconsideration was void.) citing *In re the Marriage of Phelps,* 74 P.3d 506, 509 (Colo. App. 2003), and ¶ 3 (nonetheless, because father filed his motion for re-consideration within fifteen days of the magistrate's written order, and the motion was erroneously acted upon by the magistrate, the motion for reconsideration may be construed as a motion for district court review). Of course the court of appeals considered the contents of the appeal in making this determination where other cases, as this case, are being summarily denied on jurisdictional grounds even though they contain the identical issue.

As shown in this case, the subsequent determinations are not applied to every case; denying equal protection, and rendering the C.R.M. and C.A.R. unconstitutionally vague.

In the case of *In re the Marriage of Moore,* 107 P.3d 1150 (Colo. App. 2005), the court cites its ruling in *Roosa, supra,;* I (in 2004, case was remanded for district court review of a magistrate's order, even though motion for reconsideration had been filed nearly two years earlier). Remanded because they required a judge's final ruling for appellate jurisdiction.

The Colorado Court of Appeals has dismissed this Petitioner's appeal, without considering the contents of the appeal, on jurisdictional grounds citing 1) failure to file a motion to review pursuant to C.R.M., 2) magistrate lacked authority to enter a ruling on a C.R.C.P. rule 59 or 60 motion,

and in doing so fails to recognize its own holdings in *In re the Marriage of Roosa, supra.*

The Colorado Court of Appeals first dismissed the appeal on a show cause order citing the magistrate had authority to rule on the motion and therefore they had no jurisdiction (because a motion to review pursuant to C.R.M. had not been filed even though a timely motion to reconsider had been filed). Thereafter the same court denied a petition for rehearing citing the magistrate did not have authority to rule on the motion and therefore they had no jurisdiction (even though the magistrate acted upon the motion to reconsider and a judge acted upon a motion to review). The rulings show further confusion, were summarily concluded without considering the circumstances presented in the appeal, are contradictory, and in conflict with the holdings in *Roosa, supra,* and related cases. The circumstances in this case are parallel with those in *Roosa, supra,* however the merits were never reached due to the erroneous summary dismissal of this appeal. Further issues in the appeal affecting the determination of whether C.A.R. or C.R.M. were to be used ; whether the magistrate was acting with or without consent (unknown to absent Petitioner),were never considered due to the summary dismissal. Because Petitioner was never served and not present, he was never advised of his right to, or procedure for, appeal. Every due diligence has been put forth yet Petitioner has been denied due process at each and every level of the State Courts.

Denial of due process in violation of both State and Federal Constitutions was raised in the petition for rehearing in the Appellate Court and in

the Writ for Certiorari in the Colorado Supreme Court but was never addressed by either court. See appendix attachment 6.

ARGUMENT

The Court of Appeals erred in dismissing Petitioner's Appeal for lack of jurisdiction.

I. Jurisdiction is properly before the court because 1) a motion for reconsideration was timely filed and subsequently ruled upon by the magistrate, and 2) thereafter the magistrate's ruling, a judge entered a final appealable ruling on a timely motion to review, all in accordance with both C.R.M. and C.A.R., and in accordance with the holdings in *In re the Marriage of Roosa, supra, In re the Marriage of Moore, supra,* and related cases.

The Court of Appeals issued an order to show cause and dismissed the appeal stating the magistrate had authority...without consent and no timely motion to review had been filed. See Appendix attachment 1. A response to the show cause showed a motion for reconsideration was timely filed and lost by the court as conceded by appellee. See Appendix attachment 4 item 4 and attachment 5. The appeal was dismissed because this lost motion was a motion to reconsider and not a motion to review; contrary to *Roosa, supra.*

Thereafter a petition for rehearing was filed and denied, the court stating "A magistrate does not have jurisdiction to consider motions pursuant to C.R.C.P. 59 or 60..." See Appendix attachment 2. This is also contrary to *Roosa, supra,* because a judge reviewed the Magistrate's rulings and entered a final appealable ruling. These rulings are clearly con-

tradictory and give no consideration to the holdings in Roosa, supra, and related cases. Petitioner has been denied equal protection and has been denied due process of law afforded by both State and Federal Constitutions.

II. The Court of Appeals erred in upholding the fraudulent conveyance judgment which was based on underlying judgments entered by a Magistrate without authority (and subsequently found to be void; see appendix 2)

These unauthorized judgments were used to obtain a judgment in a fraudulent conveyance action (05SC119). The State Courts have refused to join the cases even though they are entwined, based one upon the other. The 05SC119 Appeal was affirmed on the magistrate's judgment in the later case. See appendix attachment 7. The later case was dismissed because the magistrate had no authority to enter the judgment. It has resulted in a nonsensical cycle.

The Magistrate's judgments are void as are all judgments had thereunder. See *Weber v. Williams*, 137 Colo. 269, 324 P.2d 365 (1958).

The vagueness presented in the C.R.M. and C.A.R. impermissibly infringe the constitutional safeguards of fundamental fairness and due process, and create the danger of arbitrary enforcement, as shown in this case. See: *People v. Beruman*, 688 P.2d 789 (Colo.1982) and *United States Constitution*.

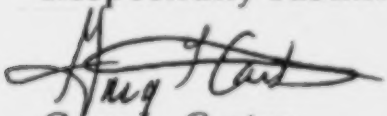
Amendment V: (...nor be deprived of life, liberty, or property without due process of law...)

Amendment XIV: (...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.)

WHEREFORE Petitioner requests this Honorable Court reinstate his appeal and or grant any other relief as afforded by law.

Respectfully submitted,



Greg L. Carter
1175 S. Huron
Denver, CO 80223
(303)871-8803

APPENDIX EXHIBIT 1

COLORADO COURT OF APPEALS
No. 03CA2361
ORDER
Tr. Ct. No. 96DR2267

In re the Marriage of
Gregory L. Carter,

Petitioner-Appellant,

and
Rebecca S. Raish,

Respondent-Appellee.

The Court DEFERS ruling on all pending motions in this case, and enters the following ORDER TO SHOW CAUSE:

In this case, the magistrate had the authority to enter the November 12, 2002, order without the parties' consent. See C.R.M. 6(b); People ex rel. Garner v. Garner, 33 P.3d 1239 (Colo. App. 2001).

If an order of a magistrate is entered without the consent of one or more of the parties, then review must be sought with the district court within 15 days of the entry of the magistrate's order. C.R.M. 7(a) (1). Here, it appears that appellant filed a request for district court review on December 16, 2003, 34 days after the magistrate's order was entered.

If a timely request for review is not sought, then the magistrate's order shall become the order or judgment of the district court, *and a party shall not be entitled to appellate review*. C.R.M. 7 (a) (4).

IT IS THEREFORE ORDERED that appellant

shall show cause, if any there is, in writing and within 21 days from the date of this order, why this appeal should not be dismissed with prejudice for failure to seek timely review of the magistrate's order in district court. Failure to file a timely response to this Order shall result in dismissal of the appeal without further notice.

Further, Christy Carter was not a party to the action in the district court, and is not an appellant in this case. Further, this case will not be consolidated with case 03CA671.

BY THE COURT

Dated: Aug 18, 04

Copies to: Counsel of Record pb/sa
District Court

COPIES MAILED TO
COUNSEL OF RECORD
Tri. Ct. Clerk
Jefferson
AND Pro Se
ON 8-18-04
By s/_____
COLORADO COURT OF APPEALS

COLORADO COURT OF APPEALS
No. 03CA2361
ORDER
Tr. Ct. No. 96DR2267

In re the Marriage of
Gregory L. Carter,

Petitioner-Appellant,

and
Rebecca S. Raish,

Respondent-Appellee.

Upon the consideration of the response to the order to show cause and the motion to dismiss filed by Appellee, the Court DISMISSES the appeal. No timely motion to review the magistrate order by the district court was filed.

BY THE COURT:
Kapelke, J.
Webb, J.
Russel, J.

Dated: Sept. 22, 2004
Copies to: Counsel of Record pb/3j
Clerk of the District Court

COPIES MAILED TO
COUNSEL OF RECORD
Tri. Ct. Clerk
Jefferson
AND Pro Se
ON 9-22-04
By s/_____
COLORADO COURT OF APPEALS

APPENDIX EXHIBIT 2

COLORADO COURT OF APPEALS
No. 03CA2361
ORDER
Tr. Ct. No. 96DR2267

In re the Marriage of
Gregory L. Carter,

Petitioner-Appellant,

and Rebecca S. Raish,

Respondent-Appellee.

Upon consideration of the petition for rehearing, the Court DENIES the motion. A magistrate does not have jurisdiction to consider motions pursuant to C.R.C.P. 59 or 60, and such motions do not toll the time for filing the motion review. See In re Marriage of Phelp, 74 P.3d 506 (Colo. App. 2003).

BY THE COURT:
Kapelke, J.
Webb, J.
Russel, J.

Dated: Feb. 2, 05
Copies to: Counsel of Record pb/3j
Clerk of the District Court

COPIES MAILED TO
COUNSEL OF RECORD
Tri. Ct. Clerk
Jefferson
AND Pro Se
ON 2-2-05
By s/_____
COLORADO COURT OF APPEALS

APPENDIX EXHIBIT 3

CASE NO. 05SC153

SUPREME COURT, STATE OF COLORADO
TWO EAST 14TH AVENUE
DENVER, COLORADO 80203

CERTIORARI TO THE COURT OF APPEALS, 03CA2361 DISTRICT COURT, JEFFERSON COUNTY, 96DR2267

In re the Marriage of:
Petitioner:
GREGORY L. CARTER,
and
Respondent:
REBECCA S. RAISH.

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,
IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MAY 16, 2005.

Copies mailed via the State's Mail Services Division on 05/16/05 [Supreme Court – State of Colorado]

Gregory L. Carter
Register #105284
B.V.C.F.
PO Box 2017

Buena Vista, CO 81211

Clerk of the Combined Court
Jefferson Court Facility
100 Jefferson County Pkwy
Golden, CO 80401

Christy Carter
1175 S. Huron
Denver, CO 80223

Honorable Jane A. Tidball
Jefferson Court Facility
100 Jefferson County Pkwy
Golden, CO 80401

John Cimino
925 E. 17th Ave.
Denver, CO 80218

Clerk of the Court
Colorado Court of Appeals

CASE NO. 05SC119

SUPREME COURT, STATE OF COLORADO
TWO EAST 14TH AVENUE
DENVER, COLORADO 80203

CERTIORARI TO THE COURT OF APPEALS,
03CA0671 DISTRICT COURT, JEFFERSON
COUNTY, 01CV2338

In re the Marriage of:
Petitioner:
GREGORY L. CARTER,
and
Respondent:
REBECCA S. RAISH.

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,
IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MAY 16, 2005.

Copies mailed via the State's Mail Services Division on 05/16/05 [Supreme Court – State of Colorado]

Gregory L. Carter
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B.V.C.F.
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Denver, CO 80218

Clerk of the Court
Colorado Court of Appeals

APPENDIX EXHIBIT 4

COURT OF APPEALS, STATE OF COLORADO
Colorado State Judicial Building
2 East 14th Avenue, 4th Floor
Denver, Colorado 80203
(303) 867-3785

District Court, Jefferson County
Lower Court Judge: Hon. Jane A. Tidball
Case No. 96 DR 2267

Appellant: Gregory L. Carter and Christy Carter
Appellee: Rebecca S. Raish

Attorney for Appellant
John A. Cimino
JOHN A. CIMINO, P.C.
925 East 17th Avenue
Denver, Colorado 80218
Telephone: (303) 830-7135
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E-mail: jcimino@aol.com
Atty. Reg. No. 14032

Case Number: 03 CA 2361

APPELLEE'S MOTION TO DISMISS APPEAL

Appellee, Rebecca S. Raish, by and through her counsel, JOHN A. CIMINO, P.C., for her Motion to Dismiss this appeal, respectfully states as follows:

1. On August 18, 2004, this Honorable Court entered an Order to Appellant to show cause as to why this appeal should not be dismissed. As is clear from the record and for the reasons stated herein, this appeal should be dismissed for lack of appellate jurisdiction.

2. In his Response to the Order to show cause,

the Appellant admits that he filed a "motion to reconsider" the November 12, 2002 ruling. This is not the correct procedure. The proper procedure is to file a "Motion for Review" which filing will cause the a district court judge to review the entire record rather than to have a magistrate "reconsider" the last filed motion. C.R.M. 7 (a) (1).

3. Moreover, this Court is correct when it notes that the Appellant failed to file his Motion to Reconsider within the 15 day deadline as required by the rules.[1]

4. The record does appear to reflect the fact that the Appellant's Motion was lost by the court, although it is unclear who wrote that note on Appellant's Exhibit 13 or if indeed the court did lose the motion or whether it was actually filed timely. Regardless, the Appellant has the burden to comply with the rules and if his Motion to review was lost in the mail or otherwise, Appellee would argue that he must risk the consequences of failing to obtain a timely court stamped copy proving the actual filing (as he did on December 16, 2002).

WHEREFORE, Appellee moves to dismiss this appeal for the reasons stated.

Dated this 10th day of September, 2004.

Respectfully submitted,
JOHN A CIMINO, P.C.
s/_____
John A. Cimino, Reg. No. 14032
925 East 17th Avenue
Denver, Colorado 80218

Telephone: 303-830-7135

[1] This court's Order to show cause states that the Appellant's Motion to Review was filed on December 16, 2003. It was actually filed on December 16, 2002. In any event, it was filed untimely.

APPENDIX EXHIBIT 5

Sworn Affidavit of Christy L. Carter

This affidavit is designated for use in official proceeding; Appellate Case # 03CA2361, and in response to Order to Show Cause of August 18, 2004.
I, Christy L. Carter:

In regards to the November 25, 2002 "Motion to Modify Child Support and Motion to Reconsider Motion to Set Aside," a motion in response to the Magistrate's November 12, 2002 ORDER:

Do hereby SWEAR, AFFIRM, and CERTIFY that I personally served all parties with said motion by placing it in a United States Postal depository on November 25, 2002 — postage prepaid — complete with a Certificate of Mailing.

I further SWEAR, AFFIRM, and CERTIFY that I phoned the Magistrates Court Clerk, discovered the absence of said motion, notified the Petitioner Greg Carter, and subsequently filed another motion, the December 16, 2002 "Motion to Reconsider Ruling of November 12, 2002 AND Motion to Modify Child Support" on behalf of Petitioner Greg Carter.

s/_____
Christy L Carter
1175 S Huron
Denver, CO 80223

Sworn before me this 7th day of Sept., 2004
By: s/_____
R. CECILIA VIGIL
NOTARY PUBLIC
STATE OF COLORADO
My Commission Expires 1-14-2007

APPENDIX EXHIBIT 6

SUPREME COURT OF COLORADO
2 East 14th Ave., Denver, CO 80203

COLORADO COURT OF APPEALS
2 East 14th Ave., Denver, CO 80203
case number 03CA2361

DISTRICT COURT, JEFFERSON COUNTY, COLORADO
Court Address:
100 Jefferson County Pkwy, Golden, CO 80401
Lower Court Judge: Tidball, case number 96DR2267

Defendants / Appellants: GREGORY L. CARTER

Plaintiff / Appellee: REBECCA S. RAISH

Appellant entering appearance PRO SE:

Gregory L. Carter
B.V.C.F. #105284
PO Box 2017
80223
Buena Vista, CO 81211-2017

Christy Carter
1175 S. Huron
Denver, CO

Case Number: 05SC153

PETITION FOR WRIT OF CERTIORARI

Gregory L. Carter
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Buena Vista, CO 81211-2017

Christy Carter
1175 S Huron
Denver,

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Note:

The Appellate clerk has advised that a certified transcript of the record of the case is not required.

TABLE OF AUTHORITIES

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In Re: Marriage of Roosa, 89 P.3d 524 (Colo. App

2004)
In Re: Marriage of Schmidt, 42 p.3d 81 (Colo. App 2002)
In Re: Marriage of Talbott, 43 P.3d 734 (Colo. App. 2002)
People v. Kerner, 404 U.S. 519, 520 (1972)
Re: Marriage of Ferris, 04CA0065 (2005)
Weber v. Williams, 137 Colo. 269, 324 P.2d 365(1958)
White v. District Court, 766 P.2d 632 (Colo. 1988)

ADVISORY LISTING OF ISSUES

The Court of Appeals ordered dismissing the appeal for lack of jurisdiction is in direct conflict with established precedence, specifically; In Re: Marriage Roosa, 89 P.3d 524 (Colo.App.2004), and related cases sited therein.

The Court of Appeals erred in applying Garner v. Garner and In Re: Phelps to this case without first establishing consent issues before a magistrate which dictate appellate procedure.

The Court of appeals erred in finding appellant followed wrong procedure for appeal which denied appellate jurisdiction.

The Court of Appeals erred by not certifying the case to the supreme Court pursuant to C.A.R. 50 and/or by not remanding the case to the District Court to set aside the judgments for lack of authority/jurisdiction in ruling on contested matters without consent.

The Court of Appeals erred by not considering excusable neglect where appellant was afforded

no due process and was left without any notice of appellate rights.

The rules of C.A.R. and C.R.M are unconstitutionally vague. All appeal issues relate to no due process and equal protection yet appeal was dismissed for failure to follow proper procedure that could only be known if appellant was afforded due process. The Supreme Court has promulgated only C.R.M. which do not contain a separate section on procedure.

BASIS FOR JURISDICTION

Carter v. Raish (Colo. App. No 03CA2361, Feb. 2, 2005) Copy attached. The findings of the court are inapposite to the case at hand and contrary to the record and actual facts. Appellant has been denied due process.

STATEMENT OF THE FACTS

On April 7, 2000, Greg Carter was incarcerated. In June of 2000, a child custody modification action, initiated by Rebecca Raish, was to be held and was subsequently reassigned to another court without notice to Greg Carter. The new court entered a judgment against absent Greg Carter in September 2000. Using that judgment, a subsequent Child Support Modification judgment was entered against absent Greg Carter in June 2001. Using that judgment, a subsequent fraudulent conveyance action was initiated by Rebecca Raish and judgment was entered against Greg Carter and his daughter in December 2002.

STATEMENT OF THE CASE

1. On September 13, 2000 a child custody judgment was entered without service, notice, or

due process before a judge.

2. On June 12, 2001 a child support judgment was entered without service, notice, or due process based on the first judgment, involved an unauthorized attorney; and was heard before a magistrate in another court division.

3. Upon discovery of the judgment(s) and an unauthorized attorney, and without any knowledge of whether the proceedings were "with" or "without consent;" motions to set aside both judgments were filed with the same magistrate on August 12, 2002. On November 12, 2002 the magistrate denied the C.R.C.P. 60(b) motions under a clear abuse of legal standard and established precedences, and without authority.

4. On November 25, 2002, December 16, 2002 "Motions to Reconsider" the Nov. 12, 2002 ruling, and on December 16, 2002 "Motion to Certify" the ruling to a judge were filed and subsequently denied.

5. On December 8, 2003, Notice of Appeal was filed.

6. On March 19, 2004 an opening brief was filed.

7. On August 18, 2004 the Appeals Court issued an order to show cause.

8. On September 22, 2004 the appeals court dismissed the appeal by misapplying Garner v. Garner, 33 P.3d 1239 (Colo. App. 2001).

9. On February 2, 2005 the appeals court denied a petition for rehearing by misapplying In Re: Marriage of Phelps, 74 P.3d 506 (Colo. App. 2003).

10. This petition for certiorari followed.

REASON FOR GRANTING WRIT

The Court of Appeal's order dismissing this appeal is in direct conflict with established precedence and appellant is being denied equal protection afforded in those precedent cases (listed in argument herein).

The Supreme Court's promulgated rules for C.R.M. do not contain a separate section on procedure. Magistrates, Judges, Appellate Courts, and lawyers alike are experiencing ambiguity between the C.R.M. and C.A.R. and this appeal has been erroneously dismissed as the cost of the controversy.

Absolute denial of due process.

The first judgment was obtained with no service, no due process, and no jurisdiction. That judgment was then used to obtain a second judgment, again without service, due process, or jurisdiction. Jurisdiction was raised at this hearing. The Magistrate's response "well I guess all this need to get raised, but I don't need to do that" (v.1,p.195-198(9)). That judgment was used to obtain a third judgment (case no. 03CA0671/05SC119) which is a fraudulent conveyance action, all through fraud to the court and without due process. A family's entire livelihood is at stake. Petitioner was further denied due process by being denied knowledge of the actions of an unauthorized attorney, and denied notification of the right to, and procedure for appeal.

This case raises issues of constitutional magnitude requiring interpretation of statues and rules not heretofore determined, deviation from due

process exists (C.A.R. 49) and notwithstanding the merits of the case; application of C.A.R. 2 is proper. A complete breakdown in the judicial system has taken place in this case and review by the State's highest court is necessary to solve constitutional due process violations.

Dismissing an appeal based on consent of a magistrate without determining the status of that consent deprives appellants of their right to due process.

Interpretation and application of C.R.M. and C.A.R. in this circumstance where appellants were unaware of the proceedings must be determined to guide the lower courts in this ever more prevalent circumstance in the courts.

ARGUMENT

The dismissal of the appeal for no jurisdiction based on Garner v. Garner, 33 P.3d 1239, 1241 (Colo. App 2001) and In Re: Marriage of Phelps, 24 P.3d 506, 509 (Colo. App. 2003) is clearly erroneous and in direct conflict with Phelps, supra, In Re: Marriage of Roosa, 89 P.3d 524 (Colo. App 2004), and related cases sighted therein.

In these cases, as well as In Re: Marriage of Ferris, 04CA0065 (2005), the Court of Appeals heard the appeal to determine the jurisdictional issues yet the instant appeal was dismissed without hearing the appeal, without reaching the same jurisdictional issues; and in direct conflict with the findings in the latter cases, and specifically Roosa, supra (II)(B) and Moore, supra, and cases cited therein. (nonetheless...the motion for reconsideration may be construed as a motion for district court review.) (...C.R.C.P. has no application here.) and citing

Roosa, supra(in 2004, case was remanded for District Court, to construe, motion for reconsideration as a motion for District Court review of a Magistrate's order even though motion for reconsideration had been filed nearly two years earlier); In Re: Marriage of Phelps, supra (similar).

As in Roosa, supra, here the Magistrate ruled on the motion to reconsider (record exhibit 14(a)). Additionally at the time the Magistrate ruled on this motion, a motion for District Court review was pending (record exhibit 16(a)) and subsequently ruled on Oct. 24th, 2003. A timely notice of appeal followed. The judges C.R.C.P. Rule 59 order was erroneous and suggested C.A.R. should be followed rather than C.R.M.; however proper procedure under both rules, C.A.R. and C.R.M. exists and there is a final appeal-able order pursuant to C.R.M. 7(a)(2). Jurisdiction is properly before the superior courts for appeal and properly documented in the appeal opening brief.

Many of the issues addressed in the latter cases exist in the present case, however, dismissing the instant appeal denied appellants the same protections/relief granted in those cases; decision on the merits or remand to the district court.

Questions raised in the appeal regarding jurisdiction are:

a. Shall a party that was never notified of a proceeding be held liable for a procedure he was never advised of?

b. Shall a party be held liable for actions of an unauthorized magistrate and an unauthorized attorney where the court has disallowed knowledge of those unauthorized actions which may dictate ap-

pellate rights?

c. Can an appeal be dismissed based upon jurisdiction where the question of "with" or "without" consent (dictating appellate procedure) has not been determined?

The entire appeal is based upon no due process and yet it is being dismissed for lack of procedure which could only be known if petitioner was afforded due process.

The case at hand is distinguishable from Garner, Supra and Phelps, Supra wherein the determination of consent was very clear, the parties had notice and knowledge of the proceedings, and could therefore be held accountable to follow proper appellate procedure.

In contrast, here the appellant had no notice of the proceedings and judgments were entered without due process. Upon discovery of the judgment appellant motioned the court that presided over and entered the most recent judgment. That court ruled on the C.R.C.P. 60 motions to set aside and subsequent C.R.C.P. 59 motion giving the appearance that the court was ruling "with consent." Upon appealing the denial of the motions to set aside, the Appellate Court dismissed the appeal and sites Garner, supra, and Phelps, supra, holding that C.R.M. applied to this case and cases where the magistrate acted "without consent." This holding is erroneous because, 1) degree of consent has not been determined, and the District Court refused appellant knowledge of actions of an unauthorized attorney, 2) the Magistrate ruled on contested permanent orders and C.R.C.P. 59 and 60 motions where she was either acting with consent (where-

upon appellant's procedure for appeal is in compliance with C.A.R.) OR the Magistrate was acting without authority (whereupon the ruling on the motions to set aside are therefore void).

Additionally or alternately the Magistrate's actions invoked jurisdiction and the dismissal of the appeal is erroneous. See In Re: Marriage of Roosa, supra. The Magistrate could have properly referred the motions to the judge presiding above her in her division or notified the parties that she had no jurisdiction so the appropriate remedies could have been employed. How can these issues be taxed against an absent uninformed appellant?

If the Magistrate was acting without consent, then her rulings were without authority and the judgment is void. In this situation the Court of Appeals is denying appellate review. Appellant's only avenue of relief would then be to go back to the same court that had ruled without authority and refused to set aside the void judgments that were obtained without due process; where the same outcome could be anticipated. This is simply nonsensical.

Because this latter example could be the finding of the Court without applying In Re: Marriage of Roosa, supra, appellant has previously requested the Court of Appeals to certify the case to the Supreme Court pursuant to C.A.R. 2 and C.A.R. 50, which appears to be the proper and only avenue for relief barring a finding of consent and/or excusable neglect where dismissal precludes such findings.

In addition to the ambiguity of consent in this case due to absence of due process the C.A.R. and C.R.M. Rules are unconstitutionally vague. They

clearly do not adequately give fair notice to appellants regarding motions to reconsider being exclusive to a judge and the time-tolling effect that can be interpreted from the C.A.R. Additionally C.R.M. does not state that a motion to review is the exclusive method for review precluding motions to reconsider prior to a motion to review. This ambiguity has caused many professional lawyers to forfeit their client's appellate rights as shown in Garner, supra, Phelps, supra, and related cases.

As stated by the justices in Roosa, supra (II)(A) ; Indeed, as other divisions of this court have noted, guidance on the procedures applicable to review of Magistrate's orders is yet to be developed. See In Re: Marriage of Schmidt, 42 p.3d 81 (Colo. App 2002) (although statute promulgates rules of procedure to govern Family Law Magistrates, to date the Supreme Court has promulgated only the C.R.M., which do not contain a separate section on procedure and address only a few areas of procedure); In Re: Marriage of Talbott, 43 P.3d 734 (Colo. App. 2002)

The Judges and Magistrates themselves are getting the procedure wrong; under the circumstances of this case, it would be unconstitutional to deny appellant his appellate rights in the midst of all this ambiguity.

This issue was raised in the petition for rehearing and erroneously decided by applying Phelps, supra, where consent and due process during the proceedings was not at issue. The Court of Appeals ruling confirms that either appellant is properly before the court ("consent") OR the Magistrate acted without authority ("without consent")

and her rulings are void and should be set aside. In this present case and where consent is ambiguous to the absent appellant, the C.A.R. nor C.R.M. give clear and adequate procedure to secure appellant's constitutional right to appeal. Following In Re: Marriage of Roosa, supra, jurisdiction is properly before the Court in either event.

The District Court and the Appellate Court erred in not pursuing knowledge of the actions of the unauthorized attorney as raised in the District Court and appeal, by not treating the Motion to Reconsider as a motion to review in the presence of a pro se motion filed before a Magistrate outlining no due process and no knowledge of the proceedings; in line with" White v. District Court, 766 P.2d 632 (Colo. 1988), DePoneoda v. Price, 915 P.2d 1278 (Colo. 1996) (holding that a motion for relief should be treated accordingly based upon substantive constitutional issues raised therein, rather than on the label placed upon the heading). Also see" People v. Kerner, 404 U.S. 519, 520 (1972) (holding pro se complainant held to less stringent standards...) and Dudley v Keller, 33 Colo. App. 320, 521 P.2d 175 (1974) (holding negligence of counsel will not be imputed to the client and may be considered excusable neglect entitling the client to relief from the judgment). As raised in the Appeal opening brief, if appellant had no knowledge of the proceedings, how could he be held liable for any action other than to motion the court that is holding the case to set aside the void judgments. No other knowledge was afforded appellant. Additionally the Magistrate's C.R.C.P. Rule 60(b) ruling is contumelious and clearly violates due process.

The Court of Appeals stated that they lacked jurisdiction to hear the appeal.

However they did not consider the consent issues under the clear proprietary circumstances of this case. Nor did they consider the precedence set in In Re: Marriage of Roosa, supra. Appellant had no knowledge of the proceedings and the Magistrate had ruled on contested permanent orders and C.R.C.P. Rule 59 and 60 motions giving the outward appearance to absent appellant that the proceedings had been conducted with consent. Appellant asserted due diligence to cover procedure in any event. Coupled with all the dynamics in this case, the Magistrate's actions, and excusable neglect, Appellant should be granted relief from the void judgments.

If the District Court as well as the Appellate Court refuse to grant relief from void judgments then who has jurisdiction to do so?

CONCLUSION

The Courts have proper jurisdiction and the Magistrate's orders are void.

This void judgment(s) was the factual basis for the summary judgment handed down in the 03CA0671 case.

Irrespective of whether this case is remanded to a District Court judge or decided upon the merits, the 03CA0671 judgment must be vacated. See Weber v. Williams, 137 Colo. 269, 324 P.2d 365(1958) and related cases cited in the appeal opening brief (holding... all proceedings had thereunder are ...absolute nullities).

Petitioner was not afforded d' e process – notice of the proceedings, and wa .refore not pre-

sented nor advised of any appellate rights. Because the District Court could have ruled without authority the Appellate Court has no jurisdiction. The District Court refuses to set aside clearly void judgments and the Appellate Court dismisses the appeal without a determination of consent or excusable neglect leaving the only and nonsensical avenue of relief of an independent action in the District Court that acted without authority and denied the relief to begin with. The lower courts erred by not considering or determining the issues of consent, no due process, equal protection, unauthorized attorney, excusable neglect, and the inherent fraud to the Court. All raised in the opening brief but thus far ignored. Due to the complete breakdown of the judicial system the proper remedy is for the Supreme Court to exercise its authority and jurisdiction pursuant to C.A.R. 2 and C.A.R. 49 in reviewing this case.

Should this court remand the case to the District Court for lack of Magistrate authority whereupon the merits of the case are not reached, appellants request the fraud claims be examined and further request guidance on procedure for costs (C.A.R. 39 or C.R.M. ? / against state or appellee?) at both Appellate and District Court levels as well as punitive and attorneys fees in both cases.

WHEREFORE Appellants respectfully request this honorable court grant this Petition For Certiorari and grant such relief as constitutionally required and allowed by law.

Respectfully submitted,

s/_____ s/_____
Greg Carter Christy Carter
B.V.C.F #105284 1175 S. Huron
P.O. Box 2017 Denver, CO 80223
Buena Vista, CO 81211

I wish this case 03CA0671 be combined and reviewed with case 03CA2361.

_____
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing "Petition for Writ of Certiorari" was mailed on the 4th day of March, 2005, postage fully prepaid to:

Clerk of the Court
Supreme Court of Colorado
2 East 14th Ave.
Denver, CO 80203

Clerk of the Court
Colorado Court of Appeals
2 East 14th Ave.
Denver, CO 80203

John Cimino
925 E. 17th Ave.
Denver, CO 80218

By: s/_____
Christy Carter

APPENDIX EXHIBIT 7

COLORADO COURT OF APPEALS
Court of Appeals No.: 03CA0671
Jefferson County District Court No. 01CV2338 Honorable Jack W. Berryhill, Judge

---

Rebecca S. Raish,
Plaintiff-Appellee,
v.
Gregory L. Carter and Christina L. Carter, Defendants-Appellants.

JUDGMENT AFFIRMED

Division V
Opinion by: JUDGE WEBB
Dailey and Sternberg*, JJ., concur
NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: December 2, 2004
No Appearance for Plaintiff-Appellee Gregory L. Carter, Pro Se Christina L. Carter, Pro Se

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2004.

In this fraudulent conveyance action, pro se defendants, Gregory L. Carter and Christina L. Carter, his adult daughter, appeal the summary judgment in favor of his former spouse, plaintiff, Rebecca S. Raish, who has not entered her appearance in this appeal. We affirm.

On April 7, 2000, Carter was convicted of various offenses and sent to the Jefferson County Detention Facility. At that time, he was subject to a child support order. The following facts are undisputed.

Carter transferred to his daughter his stock in a family business on April 3, 2000, his house on April 16, 2000, and his vehicles on June 23, 2000. Carter paid child support for his son through April 2000, but stopped in May 2000. On May 29, 2000, Carter was transferred to the Department of Corrections (DOC) for the remainder of his sentence. On June 12, 2001, at plaintiff's request, the court in the dissolution action modified Carter's child support obligation and entered judgment against him for child support arrearages.

Plaintiff then filed this action against Carter, his daughter, and his current wife, who was dismissed by stipulation. Defense counsel was allowed to withdraw after plaintiff moved for summary judgment and before he filed an opposition brief. Although defendants then filed a pro se opposition brief, the court granted plaintiff's motion, voided the transfers, dismissed plaintiff's other claims, and awarded plaintiff her attorney fees.

Carter appealed the order modifying child support in case number 03CA2361 and moved to consolidate that case with this appeal. The motion to consolidate was denied and the appeal in 03CA2361 was dismissed as untimely. Therefore, while Carter asserts numerous errors in that case, including a jurisdictional argument, only the fraudulent conveyance action is properly before us.

I.

Defendants contend the trial court erred in entering summary judgment. We disagree.

Appellate review of summary judgment is de novo. Summary judgment is only appropriate when no disputed issues of material fact exist and the moving party is entitled to judgment as a matter of law. Beeftu v. Creekside Ventures LLC, 37 P.3d 526 (Colo. App. 2001). In determining whether summary judgment is appropriate, a reviewing court must view the facts in the light most favorable to the nonmoving party. GE Life & Annuity Assur. Co. v. Fort Collins Assemblage, Ltd., 53 P.3d 703 (Colo. App. 2001).

Here, we discern no disputed issue of material fact precluding summary judgment. In an affidavit supporting defendants' own motion for summary judgment, Carter conceded he transferred his stock, house, and vehicles, which constituted all of his assets, to his daughter for no consideration other than her promise to assume his debts. Hence, we treat their arguments as going to the trial court's legal conclusions.

Under the Colorado Uniform Fraudulent Transfers Act (CUFTA), § 38-8-105(1), C.R.S. 2004:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(I) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(II) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

We agree with the trial cour that Carter made fraudulent transfers in violation of § 38-8-105(1)(b)(II) because he transferred all of his assets, he faced lengthy incarceration, and he remained subject to the child support order.

A.

We reject defendants' assertion that the action is barred by the statute of limitations. A frauuulent conveyance action must be brought within four years from the date of the transfer. Section 38-8-110, C.R.S. 2004. Here, plaintiff clearly brought the action within four years of the April and June 2000 transfers at issue.

B.

We need not address defendants' argument that Carter conveyed his assets, not to defraud creditors, but in anticipation of his transfer to DOC and to comply with a DOC penal code prohibition against entering into contracts.

The DOC defines this offense as when an offender "enters into a contract or engages in any business without the written approval of a DOC

administrative head or designee." Colorado DOC Code of Penal Discipline 51 (rev. Sept. 1, 2001). However, action allegedly taken to comply with this regulation would be probative only of Carter's intent, which is irrelevant under § 38-8-105(1)(b)(11).

C.

Defendants next argue that the conveyances were made in exchange for the daughter's promise to assume Carter's debts, which they assert constituted valuable consideration under § 38-8-105(1)(b). We disagree.

CUFTA's definition of "value" specifically excludes "an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." Section 38-8-104(1), C.R.S. 2004. Consistent with this definition, transfers for the unperformed promise by a family member to be responsible for the debts of a relative have generally been held voidable as a fraud on creditors of the transferor. Section 38-8-104 cmt. 4.

Here, Carter transferred his assets to his daughter solely for her promise to pay his debts.

Thus, the record shows the conveyances were not made for valuable consideration.

D.

Defendants also argue that the daughter is protected as a bona fide purchaser under § 38-8-109, C.R.S. 2004. We disagree.

Once a prima facie case of fraudulent conveyance has been shown under § 38-8-105, the transferee has the burden of establishing an affirmative defense under § 38-8-109. A transferee who invokes § 38-8-109 as a defense must prove action in good

faith and in exchange for reasonably equivalent consideration. Section 38-8-109 cmt. 1.

Here, because of the definition of value in § 38-8-104(1), under § 38-8-109 the daughter is not a bona fide purchaser for reasonably equivalent valuable consideration.

Accordingly, we conclude the court did not err in entering summary judgment on the fraudulent conveyance claim. II.

Defendants next contend plaintiff made misrepresentations to the trial court. We discern no ground for reversal.

Defendants' brief does not identify specific misrepresentations regarding the fraudulent conveyance claim. See People v. Diefenderfer, 784 P.2d 741 (Colo. 1989)(arguments must be supported by facts and authorities); People in Interest of D.B-J, 89 P.3d 530 (Colo. App. 2004)(same). Moreover, relief from fraud, misrepresentation, or misconduct of the adverse party is governed by C.R.C.P. 60(b).

III.

Defendants further contend the trial court erred in allowing their attorney to withdraw, which forced them to file a pro se opposition to the summary judgment motion. This issue is not properly before us.

In civil cases, a party must make an objection in the trial court to preserve the issue for appeal. See Itin v. Ungar, 17 P.3d 129 (Colo. 2000). In addition, the invited error doctrine precludes a party from inducing an erroneous ruling and then seeking to benefit by appealing that error. A party's affirmative action triggers this doctrine and bars appellate

review of alleged error arising from such action. Horton v. Suthers, 43 P.3d 611 (Colo. 2002).

Here, in response to their attorney's motion to withdraw, defendants expressed displeasure with the attorney's representation, but called the motion a "blessing." The alleged deficiencies in the attorney's performance do not constitute reasons for denying leave to withdraw. Nor is this issue cognizable as ineffective assistance of counsel, because Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), only applies in civil cases where a statute creates the right to appointed counsel. People in Interest of V.M.R., 768 P.2d 1268 (Colo. App. 1989). Hence, defendants cannot now argue either that the trial court erred in allowing their attorney to withdraw or that substantial prejudice resulting therefrom violated their fundamental rights.

Accordingly, any alleged error in allowing defendants' counsel to withdraw is not properly before us.

IV.

Defendants contend the court erred in not imposing sanctions against plaintiff for bringing a frivolous action. We decline to address this contention.

Defendants listed this issue in the "issues presented" section of their opening brief, but did not argue it anywhere in their brief. See People v. Diefenderfer, supra.

V.

Finally, defendants contend the court erred in awarding attorney fees against them. We disagree.

A court may award reasonable attorney fees against a party who asserts a claim or defense that lacks substantial justification. Section 13-17-102(2), C.R.S. 2004. A claim or defense lacks substantial justification if it is substantially frivolous, substantially groundless, or substantially vexatious. In re Estate of Becker, 68 P.3d 567 (Colo. App. 2003). Attorney fees may be awarded where a defense lacks substantial justification. Metro Nat'l Bank v. Parker, 773 P.2d 633 (Colo. App. 1989).

However, a party without an attorney shall not be assessed attorney fees unless the court finds the party clearly knew or reasonably should have known that the claim or defense was substantially frivolous, substantially groundless, or substantially vexatious. Section 13-17-102(6), C.R.S. 2004.

The determination whether a claim or defense lacks substantial justification is within the discretion of the trial court, and its decision will not be disturbed on appeal if supported by the record. Wheeler v. T.L. Roofing, Inc., 74 P.3d 499 (Colo. App. 2003).

Here, the trial court found defendants knew or reasonably should have known that their defenses lacked substantial justification. By the time defendants filed their response to the summary judgment motion, in which they asserted that the dissolution court lacked jurisdiction to order child support, the magistrate in that case had rejected the jurisdictional argument as "without merit." Moreover, defendants admitted that Carter transferred all his assets to his daughter.

Based on this record, we conclude the trial court did not abuse its discretion in awarding attorney fees against defendants.

The judgment is affirmed.

JUDGE DAILEY and JUDGE STERNBERG concur.

APPENDIX EXHIBIT 8

Colorado Appellate Rules (C.A.R. 4)

Rule 4. Appeal as of Right -- When Taken

(a) Appeals in Civil Cases (Other than Appeals or Appellate Review Within C.A.R. 3.1, 3.2 and 3.3). Except as provided in Rule 4(e), in a civil case in which an appeal is permitted by law as of right from a trial court to the appellate court, the notice of appeal required by C.A.R. 3 shall be filed with the appellate court with an advisory copy served on the clerk of the trial court within forty-five days of the date of the entry of the judgment, decree, or order from which the party appeals. In appeals from district court review of agency actions, such notice of appeal shall be in addition to the statutory forty-five-day notice of intent to seek appellate review filed with the district court required by C.R.S. 24-4-106 (9). If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within fourteen days of the date on which the first notice of appeal is filed, or within the time otherwise prescribed by this section (a), whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the trial court by any party pursuant to the Colorado Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this section (a) commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under

such rules: (1) Granting or denying a motion under C.R.C.P. 59 for judgment notwithstanding verdict; (2) granting or denying a motion under C.R.C.P. 59, to amend findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under C.R.C.P. 59, to alter or amend the judgment; (4) denying a motion for a new trial under C.R.C.P. 59; (5) expiration of a court granted extension of time to file motion(s) for post-trial relief under C.R.C.P. 59, where no motion is filed. The trial court shall continue to have jurisdiction to hear and decide a motion under C.R.C.P. 59 regardless of the filing of a notice of appeal, provided the C.R.C.P. 59 motion is timely filed under C.R.C.P. 59(a) and determined within the time specified in C.R.C.P. 59(j). During such time, all proceedings in the appellate court shall be stayed. A judgment or order is entered within the meaning of this section (a) when it is entered pursuant to C.R.C.P. 58. If notice of the entry of judgment, decree, or order is transmitted to the parties by mail, the time for the filing of the notice of appeal shall commence from the date of the mailing of the notice.

Upon a showing of excusable neglect, the appellate court may extend the time for filing the notice of appeal by a party for a period not to exceed thirty days from the expiration of the time otherwise prescribed by this section (a). Such an extension may be granted before or after the time otherwise prescribed by this section (a) has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice

as the court shall deem appropriate.
Annotations

Comment: C.A.R. 4(a) provides for the notice of appeal to be filed with the appellate court and a copy to be served upon the trial court. Time for filing the notice of appeal is increased to 45 days.

APPENDIX EXHIBIT 9

Colorado Rules for Magistrates (C.R.M. 7)

Rule 7. Review of District Court Magistrate Orders or Judgments

(a) Orders or judgments entered without consent: The chief judge shall designate on or more district judges to review orders or judgments of district court magistrates entered without consent of the parties.

(1) A party may obtain review of the magistrate's order or judgment by filing a motion to review such order or judgment with the reviewing judge no later than fifteen days, unless a shorter period of time has been set by statute, subsequent to the date of the order or judgment. A motion for review shall state with particularity the alleged errors in the magistrate's order or judgment and may be accompanied by a memorandum brief discussing the authorities relied upon to support the motion. Copies of the motion and any supporting brief shall be served on all parties by the party seeking review. Within ten days after being served with a motion for review, a party may file a memorandum brief opposing the motion.

(2) The reviewing judge shall consider a motion for review on the basis of the motions and briefs filed, together with such review of the record as may be necessary. Findings of fact made by the magistrate may not be altered unless clearly erroneous. The reviewing judge may conduct further proceedings, take additional evidence, or order a trial de novo in the district court. The reviewing judge

shall adopt, reject, or modify the initial order or judgment of the magistrate by written order, which order shall be the order or judgment of the district court.

(3) If timely review is not requested, the order or judgment of the magistrate shall become the order or judgment of the district court.

(4) A party to a proceeding conducted by a district court magistrate shall not be entitled to appellate review of any order or judgment entered in that proceeding, unless such party has filed a motion for review of the order or judgment pursuant to these Rules.

(b) Orders or judgments entered with consent: Any order or judgment entered with the consent of the parties is not subject to review under Rule 7(a), but shall be appealed pursuant to the Colorado Appellate Rules in the same manner as orders or judgments of the district court.

Source: Entire chapter amended June 16, 1988, effective January 1, 1989; (rule title), (a), IP(b), IP(c), IP(d), (d)(5), IP(e), and (f) amended and effective September 12, 1991; entire chapter amended September 30, 1999, effective January 1, 2000.

APPENDIX EXHIBIT 10

107 P.3d 1150

In re the Marriage of Gary D. Moore, Appellant, and Maureen K. Moore, Appellee.

Court of Appeals No. 04CA0065

COURT OF APPEALS OF COLORADO, DIVISION FIVE

107 P.3d 1150;2005 Colo. App. LEXIS 37

January 13, 2005, Decided

PRIOR HISTORY: [*1] Arapahoe County District Court No. 93DR905. Honorable Juanita L. Rice, Judge.

COUNSEL: Cook, Cooper & Moses, LLC, Marie Avery Moses, Greenwood Village,Colorado, for Appellant.

No Appearance for Appellee.

JUDGES: Opinion by: JUDGE CRISWELL. * Dailey and Carparelli, JJ., concur.
* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2004.

OPINIONBY: CRISWELL

OPINION: In this post-dissolution proceeding for modification of child support payable to Maureen K. Moore (mother), Gary D. Moore (father) appeals the district court's order finding that his motion for district court review of the magistrate's order was deemed denied pursuant to C.R.C.P. 59(j). We dismiss the appeal for lack of a final, appealable order.

In the 1994 permanent orders, mother was granted primary parental responsibility for the parties' three children, and father was ordered to pay child support. In 2001, mother filed a motion to modify child support.

In an order dated April 1, 2003 Decided, the magistrate increased father's child support obligation. [*2] On April 15, father filed a timely motion for district court review of the magistrate's order. In an unsigned minute order dated August 6, 2003 Decided, the district court "denied" the motion for review on the basis that the motion was deemed to be denied under C.R.C.P. 59(j) because the court had failed to rule upon it within sixty days.

Father filed a motion to reconsider the district court's ruling, arguing that C.R.C.P. 59 is inapplicable to motions for review of a magistrate's order. The district court determined that C.R.C.P. 59 did apply, and it denied father's motion to reconsider.
I.

Father contends that the district court erred in concluding that his motion for review was, pursuant to C.R.C.P. 59(j), deemed denied after sixty days. We agree.

Mother's motion to modify was filed after January 1, 2000 Decided, and therefore, this case is

governed by the Colorado Rules for Magistrates (C.R.M.) in effect at the time the motion was filed. See In re Marriage of Roosa, 89 P.3d 524 (Colo. App. 2004). And, because family law magistrates have the power and authority to modify orders for child support, In re Marriage of Roosa, supra, here, for [*3] purposes of C.R.M. 7, the magistrate's order was entered without consent of the parties. See Bryan v. Neet, 85 P.3d 556 (Colo. App. 2003)(whether an order has been entered with or without the parties' consent depends upon whether consent is required by the rules or statutes to invest a magistrate with authority to act).

Accordingly, the review procedures of C.R.M. 7(a) are applicable to the magistrate's order granting mother's motion to modify child support. See In re Marriage of Phelps, 74 P.3d 506 (Colo. App. 2003); see also In re Marriage of Malewicz, 60 P.3d 772 (Colo. App. 2002)(where magistrate had authority to hear motion without consent of parties, reviewing judge erred in concluding that parties' actual consent deprived court of jurisdiction to rule on mother's motion for review).

Pursuant to C.R.M. 7(a)(1), a party may obtain review of a magistrate's judgment or order by filing a motion requesting review by the district court. In re Marriage of Schmidt, 42 P.3d 81 (Colo. App. 2002). This is the only motion authorized by the rules governing magistrates. In re Marriage of Tonn, 53 P.3d 1185 (Colo. App. 2002) [*4] (motion for clarification of magistrate's order is not authorized by rules governing magistrates).

Here, in determining that C.R.C.P. 59 applied, the district court focused on the finality of the un-

derlying order. The court noted that: (1) C.R.C.P. 59(a) refers to "entry of judgment as provided in C.R.C.P. 58"; (2) under C.R.C.P. 58(a), a "judgment" includes an appealable decree or order as set forth in C.R.C.P. 54(a); and (3) C.R.C.P. 54(a) provides that a "judgment" includes a "decree and order to or from which an appeal lies."

However, a magistrate's order or judgment entered without consent is not a "decree and order to or from which an appeal lies," as envisioned in C.R.C.P. 54(a). Under C.R.M. 7(a)(4), an appeal may not lie from a magistrate's order unless a motion for review is first filed. People ex rel. Garner v. Garner, 33 P.3d 1239 (Colo. App. 2001). And, once a motion for review is filed, a district court reviewing judge must take action upon that motion pursuant to C.R.M. 7(a)(2) to enter a final appealable order. See In re Marriage of Malewicz, supra (there was no order or judgment that could be set aside pursuant to C.R.C.P. 60(b) until reviewing judge adopted magistrate's earlier order; under C.R.M. 7(a)(3), magistrate's earlier order would be final only if no motion for review were filed).

Thus, we agree with father that C.R.C.P. 59 has no application here. Indeed, this holding is clearly implied in past appellate opinions that have remanded cases for the reviewing courts to rule upon motions for review, even though more than sixty days have elapsed. See In re Marriage of Roosa, supra (in 2004, case was remanded for district court to construe motion for reconsideration as a motion for district court review of a magistrate's order, even though motion for reconsideration had been filed nearly two years earlier); In re Marriage

of Phelps, supra (similar).

Accordingly, there is not yet a final order for us to review, see In re Marriage of Malewicz, supra, and no such final order shall exist until the district court rules upon father's motion for review.

II.

Because we lack jurisdiction over this controversy and cannot exercise any appellate jurisdiction until father's motion is ruled upon, it would be improper for us to make any comments [*6] upon the merits of that motion. We reject father's invitation to do so.

The appeal is dismissed.

JUDGE DAILEY and JUDGE CARPARELLI concur.

74 P.3d 506

In re the Marriage of Patrick M. Phelps, Appellant, and Cheryl Robinson, Appellee.

Court of Appeals No. 02CA0354

COURT OF APPEALS OF COLORADO, DIVISION A

74 P.3d 506;2003 Colo. App. LEXIS 771

May 22, 2003, Decided

SUBSEQUENT HISTORY: Released for Publication August 19, 2003.

PRIOR HISTORY: [*1] Larimer County District Court No. 01DR416. Honorable Stephen J. Schapanski, Magistrate.

COUNSEL: Kraemer & Golden, P.C., Randy Golden, Michael M. O'Brien, Fort Collins, Colorado, for Appellant.

Jennifer I. Holt, Denver, Colorado, for Appellee.

JUDGES: Opinion by JUDGE METZGER *. Casebolt and Pierce *, JJ., concur.
* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2002.

OPINIONBY: METZGER

OPINION: Patrick M. Phelps appeals the magistrate's order determining that he is not married at common law to Cheryl Robinson. We dismiss the appeal for lack of a final order and remand the case for further proceedings.

In March 2001, Phelps filed a petition for dissolution of what he alleged was the parties' common law marriage. Robinson answered that the parties had cohabited, but were unmarried, and she requested a determination that the parties were not married at common law.

A May 2001 minute order reflects that the parties consented to the magistrate's resolution of the issue [*2] whether a common law marriage existed. After an evidentiary hearing, the magistrate entered a written order in December 2001 finding that the parties were not married at common law and dismissing Phelps' action for dissolution.

Fifteen days later, Phelps filed a motion for reconsideration, or alternatively, for amendment of the judgment. Finding that the December order did not accurately reflect the bench ruling, the magistrate, in a January 2002 order, vacated the first order and adopted the transcript of the bench ruling as the order.

Phelps then filed a notice of appeal directly with this court, alleging that the magistrate erred in finding no common law marriage existed. This court ordered Phelps to show cause why the appeal should not be dismissed for failure to seek timely district court review of the magistrate's order. A motions division of this court deferred ruling on the order to show cause and ordered the parties to brief

the issue whether Phelps was required to seek review in the district court before filing an appeal in this court.

I.

Phelps contends that the status of marriage is a "civil" matter governed by the [*3] Uniform Marriage Act, § 14-2-101, et seq., C.R.S. 2002 (UMA), and, because the parties consented to having this "civil" issue heard by the magistrate, district court review of the magistrate's order was unnecessary. In contrast, Robinson argues that this is a "family law" matter falling under the Uniform Dissolution of Marriage Act, § 14-10-101, et seq., C.R.S. 2002 (UDMA), and, because the magistrate had authority to conduct the hearing on this "family law" matter regardless of the parties' consent, district court review was required before appeal. We agree with Robinson.

The proceedings before the magistrate occurred after January 1, 2000, and therefore this case is governed by the current Colorado Rules for Magistrates. See In re Marriage of Malewicz, 60 P.3d 772 (Colo. App. 2002).

District court magistrates have different powers, depending on the type of case over which they preside. In civil cases, with the consent of the parties, a district court magistrate may perform any function except to preside over jury trials. C.R.M. 6(c)(2). In family law cases, as pertinent here, a magistrate has the power, under the UDMA, to conduct hearings on motions regardless of the parties' consent. Section 13-5-301(3)(e), C.R.S. 2002; C.R.M. 6(b); People ex rel. Garner v. Garner, 33 P.3d 1239 (Colo. App. 2001).

In turn, different review procedures apply to these types of cases, depending on the requirement for consent. A magistrate's order in a civil matter, entered with the parties' consent, is subject to the expedited appellate procedure set forth in C.R.M. 7(b) and therefore may be appealed directly to this court. In contrast, while § 13-5-301(3)(e) gives the magistrate authority to hear a matter without regard to the consent of the parties, the magistrate's order must be reviewed by the district court reviewing judge pursuant to C.R.M. 7(a). Thus, the fact that the parties consented does not render the order subject to the expedited appellate procedure set forth in C.R.M. 7(b). In re Marriage of Malewicz, supra.

Here, Phelps argues that, even though he brought this action as a dissolution proceeding, that portion of the case concerning the "status" of the marriage constituted a "civil" proceeding for purposes of C.R.M. 6 and 7. However, he premises this argument on the assumption that the UMA governs common law marriage cases. That premise is incorrect. A determination of the [*5] existence of a common law marriage is governed by the common law, not by the UMA. See, e.g., People v. Lucero, 747 P.2d 660 (Colo. 1987) (setting forth the requirements for a common law marriage without mention of the UMA); Whitenhill v. Kaiser Permanente, 940 P.2d 1129 (Colo. App. 1997) (same); see also Brush Grocery Kart, Inc. v. Sure Fine Mkt., Inc., 47 P.3d 680 (Colo. 2002) (where no statute controls, common law applies).

The issue of the existence of a common law marriage arises in all types of cases. It frequently

arises in the context of a dissolution proceeding under the UDMA. See In re Marriage of Cargill, 843 P.2d 1335 (Colo. 1993) (in concluding that the term "remarriage" as used in § 14-10-122(2), C.R.S. 2002, means the status of remarriage, court recognized that the definition of remarriage must take into account the fact that common law marriage is recognized in Colorado); In re Marriage of Gercken, 706 P.2d 809 (Colo. App. 1985) (before granting dissolution, court found that the parties had entered into a common law marriage). However, the issue is also [*6] resolved in a host of other types of cases. See, e.g., People v. Lucero, supra (spousal testimonial privilege); Carter v. Firemen's Pension Fund, 634 P.2d 410 (Colo. 1981) (entitlement to pension); Employers Mut. Liab. Ins. Co. v. Indus. Comm'n, 145 Colo. 91, 357 P.2d 929 (1960) (entitlement to workers' compensation benefits); In re Estate of Sky Dancer), 13 P.3d 1231 (Colo. App. 2000) (determination of heirship); Whitenhill v. Kaiser Permanente, supra (right to bring wrongful death action).

We hold that, for purposes of C.R.M. 6 and 7, characterization of a common law marriage determination, hinges on the context in which the issue is raised. Where, as here, the common law marriage issue is related to an effort to dissolve the alleged marriage, it constitutes a "family law case," thereby implicating C.R.M. 6(b) and § 13-5-301(3), C.R.S. 2002. See People ex rel. Garner v. Garner, supra (motion for declaratory judgment, filed in dissolution of marriage case, seeking interpretation and clarification of a prior stipulation filed in the same [*7] case, does not convert the action from a family law matter to a civil matter for purposes of C.R.M.

6).

Here, because the action was brought by Phelps as a dissolution proceeding, Robinson's denial of the existence of a common law marriage did not change the character of the proceedings from a "family law case" to a "civil case" for purposes of C.R.M. 6(b) and § 13-5-301(3). Robinson's response to the petition for dissolution constituted, in effect, a motion for a ruling on a threshold issue, and therefore the magistrate could rule on that motion. See § 13-5-301(3)(e)(V.5), C.R.S. 2002. The fact that the parties consented to proceeding before a magistrate is irrelevant, because the magistrate had authority to hear Robinson's request regardless of that consent.

Accordingly, the magistrate's order is subject to review by the district court before an appeal to this court can lie.

II.

Our conclusion that a motion for review was necessary here does not resolve the matter because we also conclude that there is not yet a final order in this case, and the case must therefore be remanded.

A magistrate is not authorized to act on a motion for reconsideration. See In re Marriage of Tonn, 53 P.3d 1185 (Colo. App. 2002) [*8] (rules governing magistrates do not authorize any motion except a motion for district court review). Accordingly, the magistrate's entry of the January 2002 order, issued in response to Phelps's motion for reconsideration, was void.

However, because the motion for reconsideration was filed within fifteen days of the magistrate's

first order, and was erroneously acted upon by the magistrate, we may construe the motion for reconsideration as a motion for district court review. See In re Marriage of Thiemann, 878 P.2d 159 (Colo. App. 1994) (where a dissolution decree and order were signed by both the magistrate and the district court judge, and husband filed a motion for reconsideration fifteen days later, which was acted upon by the magistrate but not by the district court judge, appellate court treated the motion as a motion for review and remanded the matter to the district court for entry of a written order); cf. In re Estate of Hillebrandt), 979 P.2d 36 (Colo. App. 1999) (where motion for reconsideration was acted upon by neither the magistrate nor the district court, and a separate motion for review was eventually filed, the motion for reconsideration [*9] could not be construed as a motion for review). On remand, the district court shall construe the motion for reconsideration as a motion for review, and, pursuant to C.R.M. 7(a)(2), either adopt, reject, or modify the magistrate's December 2001 order.

III.

Robinson requests attorney fees pursuant to C.A.R. 38(d) on the basis that the appeal is frivolous and groundless. However, inasmuch as that request is based on the merits of the appeal, which have not yet been reached, we deny the request without prejudice.

The appeal is dismissed without prejudice, and the case is remanded to the district court for a ruling on Phelps's motion to reconsider.

JUDGE CASEBOLT and JUDGE PIERCE concur.

89 P.3d 524

In re the Marriage of Kelly L. Roosa, n/k/a Kelly L. Bryan, Appellee, and Steven E. Roosa, Appellant.

Court of Appeals No. 02CA2533

COURT OF APPEALS OF COLORADO, DIVISION FOUR

89 P.3d 524;2004 Colo. App. LEXIS 349

March 11, 2004, Decided

SUBSEQUENT HISTORY: [*1] Released for Publication May 17, 2004.

PRIOR HISTORY: Eagle County District Court. No. 97DR173. Honorable Hugh Warder, Magistrate.

COUNSEL: Heckenbach Carlton, LLP, David W. Heckenbach, Lone Tree, Colorado, for Appellee.

Allen C. Christensen, Attorney at Law, P.C., Allen C. Christensen, Edwards, Colorado, for Appellant.

JUDGES: Opinion by JUDGE LOEB. Casebolt and Graham, JJ., concur.

OPINIONBY: LOEB

OPINION: In this post-dissolution of marriage case, this court ordered Steven E. Roosa (father) to show cause why his appeal should not be

dismissed for failure to obtain district court review of a magistrate's order and for lack of a final, appealable order. We have considered the record and the parties' briefs on the jurisdictional issues and now discharge the order to show cause in part, make it absolute in part, dismiss the appeal, and remand for further proceedings.

The original 1998 decree provided for the parties' joint legal custody of their three children, with Kelly L. Bryan (mother) as the primary residential custodian, and father's payment [*2] of child support. The following year, the parties stipulated to, and the court ordered, split residential custody and a concomitant reduction in child support, with the two sons living with father in Colorado and the daughter living with mother in Florida. The provision for joint legal custody was not modified.

As to the property division, the original decree provided that the marital residence in Colorado was to be listed and sold, with the proceeds evenly divided after payment of certain expenses. However, the court subsequently approved the parties' stipulation allowing father to retain the residence in exchange for payment to mother.

In 2001, mother filed the two motions at issue in this appeal. First, she requested entry of an order, pursuant to § 14-10-129, C.R.S. 2003, to modify the primary residence of the children, to reflect that the two sons were again living with her by agreement of the parties, a corresponding modification of child support, and enforcement of the provisions of the decree requiring that father pay for certain insurance coverage. Second, she filed a motion for enforcement and clarification of the modified order

regarding [*3] payment of her share of the equity in the marital residence.

Prior to hearing these two motions, the magistrate informed the parties that a hearing before a magistrate "for changing . . . the primary residence requires a consent by the parties." The magistrate requested, and the parties filed, written consents to having the magistrate hear the issue of the children's change of residence. The magistrate then conducted a hearing and issued two orders from which father now appeals.

In a July 2002 order, the magistrate ordered that mother was to receive the entire net proceeds of the sale of father's Florida property. The proceeds were to be applied first to retroactive child support, the amount of which was reserved for subsequent determination, then to deferred interest on the note payable to mother in connection with the marital residence, and then to child support, maintenance, and interest arrearages in the amount of $ 6,000.

In the same order, the magistrate ordered that the children were to reside with mother, but left the parenting time schedule unresolved. Because mother had not requested any modification of the previous order for joint legal custody, the magistrate noted [*4] that the parties were to "continue to share joint decision-making for the minor children."

Soon after entry of the July 2002 order, father filed a motion pursuant to C.R.C.P. 60(b) requesting reconsideration or modification of the order to reflect the parties' alleged agreement that mother would receive only a part of the net proceeds from the sale of the Florida property.

In a December 2002 order, the magistrate denied the C.R.C.P. 60(b) motion and ordered father to pay increased child support, retroactive to September 2001. Citing inadequate evidence of the amount of arrearages, the magistrate again declined to enter an amount due; instead, the parties were instructed to calculate the amount, and if they were unable to agree, they were granted leave to file a motion requesting the magistrate to determine the amount.

No district court review of these orders was requested. Father then appealed the July 2002 and December 2002 orders to this court. Questioning the finality of these orders, the lack of district court review, and the magistrate's jurisdiction over these issues, we requested the parties to show cause why the appeal should not be dismissed. The parties filed simultaneous [*5] briefs on the issues. I. Magistrate's Jurisdiction

We first conclude that the magistrate had jurisdiction to consider mother's motions.

A. Family Law Terminology

In order to analyze the jurisdictional issue properly, it is necessary to understand and clarify the changes in terminology used in family law cases in the intervening years between the original decree and the magistrate's July 2002 order.

Effective February 1, 1999, the General Assembly enacted a statutory framework in which the term "custody" was abandoned and changed to "parental responsibilities," which includes both "decision-making responsibilities" and "parenting time," as those terms are now used. See §§ 14-10-103(4), 14-10-124(1.5), C.R.S. 2003; In re Marriage of Stewart, 43 P.3d 740 (Colo. App. 2002)(change was effective

February 1, 1999, as provided in § 14-10-103(4)); In re Marriage of Schenck, 39 P.3d 1250 (Colo. App. 2001); see also Angela R. Arkin & Robert T. Hines, III, Addressing New Standards for Modification Under the Parental Responsibility Act, 28 Colo. Law. 67 (June 1999); A. Elizabeth Henson, et al., Elimination of "Custody" in Colorado: The [*6] Impact of H.B. 1183, 27 Colo. Law. 83 (Sept. 1998).

In turn, the terms "joint custody" and "legal custody" were replaced by "decision-making responsibilities." Compare Colo. Sess. Laws 1983, ch. 178, § 14-10-123.5(1) at 645 (defining "joint custody" as "an order awarding legal custody of the minor child to both parties and which provides that all decisions regarding the health, education and general welfare of the child shall be made jointly"), with § 14-10-124(1.5)(b),(court allocates "decision-making responsibility with respect to each issue affecting the child"), § 14-10-124(6), C.R.S. 2003 (contemplating that decision-making includes medical issues), and § 14-10-130(1) C.R.S. 2003 (expressly indicating that decision-making relates to education, health care, and religion). See generally People in Interest of A.M.K., 68 P.3d 563 (Colo. App. 2003)(trial court order on decision-making authority included religious, medical, day-to-day matters and education issues).

Similarly, the terms "residential custody" and "physical custody" and terms relating to the residential or physical placement of the [*7] child (including what was formerly known as visitation rights) all now appear to be encompassed by the term "parenting time," as a result of the 1999 statutory changes. See § 14-10-129 (modification of par-

enting time governs changes in a child's residence, including "the party with whom the child resides a majority of the time"); § 14-10-103(3), C.R.S. 2003 (as of July 1, 1993, changing the term "visitation" to "parenting time"); §§ 14-10.5-102, 14-10.5-104, C.R.S. 2003 (the Parenting Time Enforcement Act provides the child with access to the "parent with whom the child does not reside the majority of the time"); N.A.H v. S.L.S., 9 P.3d 354, 359 n.2 (Colo. 2000)("The term 'parenting time' replaces notions of custody and visitation rights. The General Assembly recently clarified that children are not to be treated as property and apportioned between parents. Accordingly, we no longer use the term custody, but rather parental rights and responsibilities. Courts no longer adjudicate custody and visitation, but rather divide parenting time." (citation omitted); People in Interest of A.M.K., supra (contrasting primary residential care [*8] with decision-making authority).

B. Jurisdictional Analysis

Mother's motions were filed after January 1, 2000, and, therefore, this case is governed by the Colorado Rules for Magistrates (C.R.M.) in effect at the time those motions were filed. See People ex rel. Garner v. Garner, 33 P.3d 1239, 1241 (Colo. App. 2001)(date of filing of motion at issue, not date of commencement of case, dictates application of new C.R.M.).

Under the version of C.R.M. 6(b) applicable to this case, in family law cases, a district court magistrate may perform the duties specified in §§ 13-5-301 to 13-5-305, C.R.S. 2003. See In re Marriage of Malewicz, 60 P.3d 772, 774 (Colo. App. 2002); cf. C.R.M. 6(b)(rule revised effective Nov. 6, 2003, dis-

tinguishing functions of district court magistrates and family law magistrates in family law cases). Under these sections, family law magistrates have the power and authority to modify and enforce orders for child support and to conduct hearings upon motions and postjudgment proceedings under the Uniform Dissolution of Marriage Act (UDMA), § 14-10-101, et seq., C.R.S. 2003. Section 13-5-301(3)(a), (3)(e)(V.5), (3)(e)(VII)(B), [*9] C.R.S. 2003. Accordingly, the magistrate clearly had jurisdiction over mother's motions regarding the child support and property issues.

It is less clear whether the magistrate had jurisdiction over the parenting time issue. Section 13-5-301(3)(e)(V), C.R.S. 2003, provides that family law magistrates have the power and authority to conduct hearings under the UDMA regarding "parenting time, and the modification thereof, including motions to restrict parenting time or parental contact, where the allocation of parental responsibilities is not an issue" (emphasis added).

In In re Marriage of Ferris, 75 P.3d 1170 (Colo. App. 2003), a division of this court recently noted, without resolving, an ambiguity in this statute. Section 13-5-301(3)(e)(V) grants magistrates authority to hear certain parenting time issues, but simultaneously prohibits them from hearing issues as to the allocation of parental responsibilities. This statute is inconsistent, given that parental responsibilities include parenting time. See § 14-10-124(1.5); In re Marriage of Schenck, supra; cf. § 14-10-112, C.R.S. 2003 (illustration [*10] of additional inconsistent use of the term; subsections (1) and (2) redundantly refer to "parental responsibilities . . . and parenting

time," while subsection (6) correctly refers to "decision-making responsibility[] or parenting time").

Where possible, a statute should be interpreted to give effect to all its parts. We presume that the legislature intends a just and reasonable result when it enacts a statute, and we will not read a statute to provide an unreasonable or absurd result. People v. Madden, 2003 Colo. App. LEXIS 329, ___ P.3d ___(Colo. App. No. 02CA0024, Aug. 14, 2003) . Furthermore, courts may correct evident errors in words or figures so as to give an act its manifest meaning. Capp v. People, 64 Colo. 58, 170 P. 399 (1917)(reference in statute to one section, where another section was plainly intended, was subject to correction by the court); People v. Madden, supra (reference in statute to nonexistent section is merely a typographical error that may be corrected by the court, thereby allowing logical reading of statute).

Here, a logical and reasonable interpretation of § 13-5-301(3)(e)(V), in conjunction with the UDMA, leads us to conclude that the General [*11] Assembly meant to allow magistrates to resolve parenting time issues, but not decision-making responsibilities. See Town of Erie v. Eason, 18 P.3d 1271 (Colo. 2001)(if the result is absurd, court may interpret the statute by considering laws upon the same or similar subjects). Because parenting time together with decision-making responsibilities constitute parental responsibilities, use of the term "parental responsibilities" in § 13-5-301(3)(e)(V), rather than "decision-making responsibilities," was obviously an error that we may correct. See Capp v. People, supra; People v. Madden, supra.

Thus, we conclude that the magistrate had ju-

risdiction to consider the parenting time issues, including the residential placement, in this case. The magistrate was not asked to and did not change the original grant of joint legal custody, a matter over which he lacked jurisdiction. See In re Marriage of Ferris, supra (where mother filed motion to modify decision making responsibility, parenting time, and child support, magistrate's order was vacated for lack of jurisdiction).

We are not persuaded otherwise by mother's argument that because [*12] father is not appealing the issue of parenting time, Ferris is inapplicable. While it is true that father's advisory list of issues in his notice of appeal does not include parenting time, the fact that the magistrate ruled on a motion that includes parenting time warrants our resolution of the jurisdictional issue. See In re Marriage of Ferris, supra (even though magistrate had jurisdiction over child support, fact that decision-making was at issue resulted in vacation of entire order). Furthermore, because child support was collateral to, and dependent upon, the amount of parenting time awarded, the issues were inextricably intertwined. See In re Marriage of Redford, 776 P.2d 1149 (Colo. App. 1989)(number of overnights must be determined before child support may be calculated).

Nor are we persuaded otherwise by the fact that the parties consented to the magistrate hearing mother's motions. Their consent is irrelevant, because the magistrate had authority to hear the motions regardless of that consent. See In re Marriage of Phelps, 74 P.3d 506, 509 (Colo. App. 2003).

II. Appellate Jurisdiction

Because the parties' consent was not [*13]

required for the magistrate's jurisdiction, a motion for district court review was necessary prior to appeal of these orders. See C.R.M. 7(a); People ex rel. Garner v. Garner, supra. However, for reasons discussed below, we conclude that district court review can be had only when the magistrate issues a final order.

A. Parenting Time and Child Support Order

Here, there was no final order regarding parenting time and child support because the amount of retroactive child support and the specifics of the parenting time were left unresolved. Even if the parties were able to agree on these issues, given the posture of the magistrate's rulings, the magistrate would still need to adopt their agreement to finalize the order. See In re Marriage of Micaletti, 796 P.2d 54 (Colo. App. 1990)(court is not bound by parties' agreements regarding support and custody).

Piecemeal review of orders and judgments that do not fully resolve an issue or claim is generally discouraged at any level of review, and the law in various areas specifically regulates this inefficient approach. See, e.g., Fabec v. Beck, 922 P.2d 330 (Colo. 1996) [*14] (in ballot initiative, plaintiffs must exhaust available and applicable administrative remedies to prevent piecemeal application for judicial relief); Mission Viejo Co. v. Willows Water Dist., 818 P.2d 254 (Colo. 1991)(C.R.C.P. 54(b) certification avoids piecemeal and possibly duplicative appellate review); UPS, Inc. v. Indus. Claim Appeals Office, 988 P.2d 1146 (Colo. App. 1999)(absent specific legislation to the contrary, to avoid piecemeal review, the amount of the penalty in a workers' compensation case must be determined before the

ruling as to penalties is final for purposes of judicial review); cf. § 24-10-108, C.R.S. 2003 (statute specifically allowing interlocutory appeal of decision on sovereign immunity as a final judgment); In re Marriage of Mockelmann, 944 P.2d 670, 671 (Colo. App. 1997) (temporary orders under § 14-10-108 are reviewable as final judgments because they establish the financial rights and obligations of the parties until the entry of permanent orders).

We perceive no reason why the review or appeal of a magistrate's order should be treated any differently. Thus, we conclude [*15] that, in the interest of judicial economy, a magistrate's order must fully resolve an issue before it may be reviewed by the district court or appealed to the court of appeals. Indeed, when a magistrate's order is appealed directly to the court of appeals, see C.R.M. 7(b); § 13-5-301(3)(e)(VI)(A), C.R.S. 2003; In re Marriage of Malewicz, supra, this court requires a final order. See City of Grand Junction v. City & County of Denver, 960 P.2d 675 (Colo. 1998)(under C.A.R. 1(a)(1), appeal may be taken only from a final judgment of a district, probate, or juvenile court; appellate court does not review interlocutory orders absent specific authorization by statute or rule); Hait v. Miller, 38 Colo. App. 503, 559 P.2d 260 (1977)(except as provided in C.R.C.P. 54(b), court of appeals has jurisdiction over only final judgments).

The C.R.M. contain no specific authorization for review or appeal of interlocutory orders of a magistrate, as would be required under City of Grand Junction v. City & County of Denver, supra. Indeed, as other divisions of this court have noted, guidance on the procedures [*16] applicable to re-

view of magistrate's orders is yet to be developed. See In re Marriage of Schmidt, 42 P.3d 81 (Colo. App. 2002)(although statute instructs supreme court to promulgate rules of procedure to govern family law magistrates, to date the supreme court has promulgated only the C.R.M., which do not contain a separate section on procedure and address only a few areas of procedure); In re Marriage of Talbott, 43 P.3d 734 (Colo. App. 2002).

In the absence of such guidance, we conclude that a magistrate's order must fully resolve the issues before the time for district court review begins to run. Here, because the parenting time and child support rulings are not yet final, the time for district court review has not yet run as to mother's first motion. Accordingly, this portion of the appeal must be dismissed without prejudice for lack of a final, appealable order. See C.R.M. 7(a)(4).

B. Property Division Order

The property motion requires a different analysis. The magistrate fully resolved that motion by granting mother the requested relief in the July 2002 order, and therefore that portion of that order was final when entered. See [*17] Brody v. Bock, 897 P.2d 769 (Colo. 1995)(where order completely determined parties' rights with respect to distinct claim, that portion of the trial court's order constituted a final judgment as to that claim for purposes of appeal); Gergel v. High View Homes, L.L.C., 58 P.3d 1132 (Colo. App. 2002)(final judgment is a complete determination of the rights of the parties involved).

In the December 2002 order, the magistrate then denied father's C.R.C.P. 60(b) motion for re-

consideration or modification. However, that portion of the magistrate's December 2002 order issued in response to father's motion for reconsideration was void. See In re Marriage of Phelps, supra (declaring magistrate's ruling on motion for reconsideration void); In re Marriage of Tonn, 53 P.3d 1185, 1187 (Colo. App. 2002)(rules governing magistrates do not authorize any motion except a motion for review).

Nonetheless, because father filed his motion for reconsideration within fifteen days of the magistrate's written order, and the motion was erroneously acted upon by the magistrate, the motion for reconsideration may be construed as a motion for district [*18] court review. See In re Marriage of Phelps, supra; In re Marriage of Spector, 867 P.2d 181 (Colo. App. 1993)(under former C.R.M., time for filing motion for review did not begin running until magistrate signed written order). Accordingly, the appeal regarding the property motion must be dismissed, and the case must be remanded for district court review of the magistrate's order on the property issues. See In re Marriage of Malewicz, supra (once motion for district court review is filed, the district court reviewing judge had to act pursuant to C.R.M. 7(a)(2) to create a final order).

The order to show cause is discharged in part and made absolute in part, the appeal is dismissed, and the case is remanded for the magistrate's entry of a final order on parenting time and child support and for district court review of the magistrate's final order on property issues.

JUDGE CASEBOLT and JUDGE GRAHAM concur.

43 P.3d 734

In re the Marriage of Karen K. Talbott, Petitioner, and Stephen Talbott, Respondent-Appellee, and Denver Department of Human Services, Intervenor-Appellant.

Court of Appeals No. 01CA0097

COURT OF APPEALS OF COLORADO, DIVISION THREE

43 P.3d 734;2002 Colo. App. LEXIS 109

January 31, 2002, Decided

SUBSEQUENT HISTORY: [*1] Released for Publication April 16, 2002.

PRIOR HISTORY: City and County of Denver District Court No. 79DR2741. Honorable Martin F. Egelhoff, Judge.

COUNSEL: No Appearance for Petitioner.

James J. Keil, Jr., Wheatridge, Colorado, for Respondent-Appellee.

J. Wallace Wortham, Jr., City Attorney, Lara G. Delka, Assistant City Attorney, Denver, Colorado, for Intervenor-Appellant.

JUDGES: Opinion by JUDGE ROTHENBERG. Jones and Nieto, JJ., concur.

OPINIONBY: ROTHENBERG

OPINION:

In this post-dissolution proceeding between respondent, Stephen Talbott (father), and the Denver Department of Human Services (Department), an intervenor on behalf of Karen K. Talbott (mother), the Department appeals an order of the district court denying as untimely the Department's motion for reconsideration, and an order dismissing the Department's request for review of a magistrate's order.

The dispositive issue in this appeal is the calculation of the fifteen-day period in C.R.M. 7(a)(1) that is allowed for the filing of a motion for review of a family law magistrate's order. We conclude that where, as here, the magistrate's order is entered outside the presence of the parties and later [*2] mailed to them, the fifteen-day period allowed for filing a motion for review, or a motion for enlargement of time to file for such review, commences on the date the order is mailed rather than when it was entered. We therefore vacate the orders of the district court and remand for further proceedings.

I.

Mother applied for and received child support enforcement services from the Department.

The Department later obtained a judgment against father for child support arrearages, plus interest.

In July 2000, father paid the principal amount and the Department filed a satisfaction of judgment. A month later, however, the Department moved to

set aside the satisfaction of judgment alleging, as relevant here, that it was inadvertently filed before father had paid the accrued interest.

On October 2, 2000, the magistrate entered an order denying the Department's motion to set aside the satisfaction of judgment. It is undisputed that the parties were not present when the magistrate's order was entered, and the district court registry of actions reflects that the magistrate's order was mailed to counsel.

On October 18, the Department moved for an enlargement of time in which to seek [*3] district court review of the magistrate's order. Father objected, contending the Department's motion for enlargement of time was untimely filed because, according to father, the fifteen day period had commenced on October 2 and had expired on October 17.

The Department responded, contending its motion for enlargement was timely because it was filed within fifteen days of October 4, the date on which the magistrate's order was mailed to the parties. The Department submitted an envelope from the magistrate postmarked October 4. See Dews v. District Court, 648 P.2d 662 (Colo. 1982)(postmark may rebut presumption order was mailed earlier).

The district court summarily denied the Department's motion for enlargement of time.

On October 30, the Department moved for reconsideration of the magistrate's order and also sought district court review of that order. Father then moved to dismiss the Department's motion for district court review.

On December 4, the district court denied the

Department's motion for reconsideration and dismissed the motion for judicial review. The court agreed with father that the Department's motion to review was untimely because the time for [*4] filing it had expired on October 17, fifteen days after entry of the magistrate's October 2 order.

The Department appeals the order by the district court denying its motion for reconsideration and the order dismissing the Department's motion for judicial review.

II.

The Department contends that where, as here, the magistrate's order is entered outside the presence of the parties and later mailed to them, the fifteen day period allowed by C.R.M. 7(a)(1) does not commence until the order is mailed. The Department further contends that because its motion for enlargement was filed within the fifteen-days allowed for filing the motion for review of the magistrate's order, the motion for enlargement was timely, as was its later motion for judicial review. We agree.

The Colorado Rules for Magistrates do not contain a separate section on procedure and do not provide for extensions of time in which to file the motion to review. However, C.R.M. 6(b) provides that the functions of magistrates in family law cases are as specified in § 13-5-301, et seq., C.R.S. 2001. See People ex rel. Garner v. Garner, 33 P.3d 1239 (Colo. App. No. 00CA1528, July 5, 2001).

Separate rules of procedure [*5] for family law magistrates have not been formally adopted, see § 13-5-303(2), C.R.S. 2001, under § 13-5-301(3)(e), C.R.S. 2001, but such magistrates may conduct pro-

ceedings under the Uniform Dissolution of Marriage Act, § 14-10-101, et seq., C.R.S. 2001 (the Act).

The Act provides that the Colorado Rules of Civil Procedure apply unless the Act otherwise specifies. Section 14-10-105(1), C.R.S. 2001; In re Marriage of Spector, 867 P.2d 181 (Colo. App. 1993).

C.R.C.P. 6(b) governs the enlargement of time and states that when an act is required or allowed to be done within a specified time, if cause is shown, the court in its discretion may order the time enlarged, provided that the request is made before the expiration of the "period originally prescribed." C.R.C.P. 6(b)(1); see Realty World-Range Realty, Ltd. v. Prochaska, 691 P.2d 761 (Colo. App. 1984).

As relevant here, the "period originally prescribed" is set forth in C.R.M. 7(a)(1), which states:

A party may obtain review of a magistrate's order or judgment by filing a motion to review such order or judgment [*6] with the reviewing judge no later than fifteen days, unless a shorter period of time has been set by statute, subsequent to the date of the order or judgment.

The parties thus agree, as do we, that the Department's motion for review of the magistrate's order was due within fifteen days of the order, and they further agree the Department's motion for enlargement of time was also due within fifteen days of the order. At issue here is whether the fifteen-day period in C.R.M. 7(a)(1) was extended because the magistrate's order was not entered in the presence of the parties but was mailed to them. We hold that it was.

We are unaware of any Colorado appellate

court decisions clarifying the filing requirements for motions to review when a magistrate's order is entered outside the presence of the parties and mailed to them. Cf. In re Marriage of Spector, supra (a motion to review was held timely when computed from the date of a written order, but panel did not address order that is mailed).

In contrast to other procedural rules, C.R.M. 7(a)(1) makes no distinction between orders that are mailed to the parties and those that are announced in the parties' presence. The current [*7] version of C.A.R. 4(a), for example, provides that the time to appeal commences from the entry of judgment, but if the judgment is mailed, the time to appeal runs from the date of mailing. C.R.C.P. 59(a) contains a similar provision for filing post-trial motions.

In In re Marriage of Forsberg, 783 P.2d 283, 286 (Colo. 1989), the supreme court construed a prior version of C.A.R. 4(a) and concluded "if the parties are present when an order is announced, the time to appeal commences from entry of judgment, whereas if the appealing party is notified of the judgment by mail, the time to appeal runs from the date of mailing."

The supreme court explained the reason for the differing time requirements when an order is issued in the presence of the parties and when they are notified by mail:

If the parties are present when a decision is made, they know that the time to file a post-trial motion or an appeal has commenced. In contrast, when a decision is made outside the presence of the parties, they cannot know that the time to file such appeal or post-trial motion has commenced, until

notified by the trial court.

In re Marriage of Forsberg, supra, 783 P.2d at 287.

The supreme court's reasoning applies equally to situations in which the family law magistrate's order is entered outside the presence of the parties and later mailed to them. Under such circumstances, we therefore conclude the fifteen-day period in C.R.M. 7(a)(1) for filing a motion for review begins to run on the date the order is mailed. The time for filing a motion for enlargement of time under C.R.C.P. 6(b) is similarly calculated.

Here, the magistrate's order was mailed to the parties on October 4, 2000. The fifteen days did not expire until October 19. Accordingly, the Department's motion for enlargement of time within which to file for judicial review was timely filed on October 18, and its motions for reconsideration and for judicial review were timely filed on October 30, five days after the trial court denied the Department's motion for enlargement.

III.

The Department also contends the fifteen-day period in C.R.M. 7(a)(1) for filing the motion for review was further extended by three days under C.R.C.P. 6(e).

C.R.C.P. 6(e) provides:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after [*9] the service of a notice or other papers upon him . . . and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

However, here, the Department did not need the additional three-day extension because we have concluded its motion for enlargement of time within which to file for judicial review was timely filed. Hence, we do not determine the applicability of C.R.C.P. 6(e).

IV.

The district court found in its final order that the Department's motion for review was untimely because the time for filing such a motion under C.R.M. 7(a)(1) had expired fifteen days after entry of the magistrate's October 2 order. In so finding, the court rejected the Department's arguments regarding the effect of mailing the magistrate's order. The court did not state a reason for denying the Department's motion for enlargement of time, but a logical inference is that the court accepted the father's argument and similarly concluded the Department's motion was untimely filed.

Because we have concluded otherwise, we remand to the district court for further proceedings. See C.R.M. 7(a)(2) (reviewing court may conduct further proceedings and take additional [*10] evidence). On remand, the court should reconsider the Department's motion for enlargement of time on the merits, and if the court grants the motion, it should address the merits of the Department's motion for review.

The order is vacated and the case is remanded for further proceedings consistent with the views expressed in this opinion.

JUDGE JONES and JUDGE NIETO concur.

137 Colo. 269, 324 P.2d 365
Supreme Court of Colorado, En Banc.
Marie G. WEBER, Plaintiff in Error,
v.
Stanley A. WILLIAMS, Esther Williams, Fairman Wallace Taber, also known as F. Wallace Taber, Defendants in Error.
Nos. 18178, 18179.
April 14, 1958.
Rehearing Denied May 5, 1958.

Proceeding on motions of record owner of property to have purported service of process upon her in actions for foreclosure and for quieting title quashed, foreclosure decree vacated, sheriff's sale and deed set aside, and decree quieting title vacated. The District Court, Grand County, Addison M. Gooding, J., denied motions and record owner brought error. The Supreme Court, Hall, J., held that where holder of second deed of trust on property and occupants brought actions for foreclosure and to quiet title, but although occupants knew address of record owner, affidavits made in their behalf contained statements that record owner's address was unknown, occupants' failure to disclose record owner's whereabouts was gross fraud on court and default judgments obtained after substituted service of process were void and were subject to collateral or direct attack at any time.

Reversed and remanded with directions.

HALL, Justice.

This proceeding on error involves two cases, in which the parties are identical, and are submitted

and considered together.

From the two records before us, it appears that plaintiff in error, Marie G. Weber, to whom we will refer as Weber, was defendant in each case in the trial court, and on May 1, 1950, was the owner of ranch property located in Grand County, Colorado. On that date Weber executed her note payable to defendant in error, Fairman Wallace Taber, hereafter referred to as Taber, and one of the plaintiffs in each case in the trial court, the note being **366 in the amount of $16,250 and secured by a second deed of trust on said ranch property.

On December 19, 1951, the defendants in error, Stanley A. Williams and Esther Williams, to whom we will refer as the Williams, with Taber filed their complaint in the District Court of Grand County, Colorado, Case No. 1012, naming as defendants Weber and Carl F. Fischer, Public Trustee of Grand County. In their complaint they allege that the Williams are the legal and equitable owners by deed (from whom is not stated) of the ranch property, subject to the encumbrance above mentioned; that the records of the county clerk indicate that Weber has title of record to the ranch property, *271 subject to the said encumbrance; that Taber, through the Public Trustee, Fischer, had endeavored to foreclose his deed of trust, but the Williams believe said foreclosure proceedings to be void because prematurely instituted; that Fischer has no interest in the property or note or deed of trsut of Tabor and he should be requested to surrender the same to the district court for court foreclosure thereof. Taber sought court foreclosure of his deed of trust. The note and deed of trust state the address of Weber to

be 'Sum Valley Ranch, Grand Lake, Grand County, Colorado.' No personal service on Weber was had or attempted in Colorado or elsewhere.

A motion for an order for publication of summons, signed and verified by the attorney for the Williams and Tabor, was filed simultaneously with the complaint. In the motion it is alleged that Weber's address is unknown to plaintiffs; that Weber is believed to be a resident of Chicago; that efforts to locate Weber have been made by plaintiffs' attorney, by the Clerk of the District Court of Denver and by her former attorney, all to no avail. On presentation of this motion, an order for publication of summons was entered, publication had, foreclosure proceedings completed and, on July 13, 1953, a sheriff's deed to the ranch property was issued to Taber.

On August 4, 1953, the Williams and Taber brought another action in the District Court of Grand County, No. 1073, against Weber and all unknown persons who claim any interest in the property described in case No. 1012, together with other property described in the complaint; the purpose of this second suit was to quiet the titles to said lands in the Williams and Taber. Summons was issued August 3, 1953. As in the first action, no personal service was had or attempted on Weber in Colorado or elsewhere.

Here again a motion for an order of service by publication was signed and verified by the attorney for the Williams and Taber and was filed simultaneously with the complaint. In this motion it is alleged:

*272 'This is an action * * * in rem; some of the

defendants * * * are unknown persons * * * Weber is a nonresident of the State of Colorado or has departed from the State without intention of returning * * * and * * * cannot be served by personal service in the State of Colorado:

'That search has been made of the public records of the City and County of Denver, State of Colorado, and of the records, of Hot Sulphur Springs, Colorado, and the County of Grand, and of telephone and other available directories in the said cities and counties; various inquiries have been made from persons who might have information concerning the defendants; endeavors have been made to serve defendants personally at any Colorado addresses available; but said efforts have been to no avail. The last known address of the defendant, Marie G. Weber, is Sun Valley Ranch, Grand County, Colorado, and, except as herein stated, that the addresses and last known addresses of each defendant is unknown.' (Emphasis supplied.)

On presentation of this motion an order for publication was entered and publication had. The clerk of the court mailed a copy of summons and complaint to:

**367 'Marie G. Weber--Sun Valley Ranch, Grand Lake, Grand County, colorado.'

On October 13, 1953, the trial court entered an order adjudging all defendants in default and on the same day entered its decree quieting title in Williams to certain of the property and in Taber to the balance of the property.

On June 25, 1956, Weber filed her motion in No. 1012 seeking to have the purported service of process quashed, foreclosure decree vacated and

sheriff's sale and deed set aside, for the reason that Weber had not been served with process as required by law. On the same day Weber filed her motion in No. 1073 seeking to have the purported service of process quashed and the decree quieting the titles vacated, for the same reasons urged in No. 1012.

Hearing on both motions was had on August 13, 1956, *273 at which time sworn testimony of the Williams are taken. Their uncontradicted testimony was to the effect that at all times subsequent to July 1951, they have resided upon and been in possession of the ranch property; that at all times subsequent to September 19, 1951, they had known that mail addressed to Weber or her husband at 2501 Blue Island Avenue, Chicago 8, Illinois, c/o American Brake Shoe Company, Medical Department, reached the Webers; that they, the Williams, had carried on a regular correspondence with Weber and her husband subsequent to September 19, 1951, and up to within three weeks of August 13, 1956, at which time Weber visited the Williams at the ranch property in Colorado. The Williams further testified that their attorney, he also being the attorney for Taber, never made any inquiry of them as to a 'last known address' of Weber and her husband.

There also appears in the record an affidavit of Weber, sworn to in Lake County, Illinois, July 3, 1956, filed in court August 13, 1956, wherein Weber states she and her husband at all times from May 1951 to May 1954 resided at 6312 Roscoe Street, Chicago, Illinois; that she was never personally served with summons or complaint and had never received such through the mails or otherwise. The Williams and Taber offered no evidence and filed no counter

affidavits.

Briefs were submitted and on October 10, 1956, the trial court entered its orders denying the motions and dispensing with motions for new trial. The court made no findings of fact.

Weber seeks review of the orders denying her motions to vacate the judgments. The same or similar questions are presented in both cases and both cases are presented in one set of briefs. We dispose of both cases in this one opinion.

The judgment in the first case, the foreclosure proceeding, purported to deprive Weber of her property rights; namely, her possessory rights, her legal title and *274 her right of redemption. Nothing can be more firmly established in our law than the principle that one may not be deprived of his property except by due process of law. Due process under applicable rules requires notice, by actual or substituted service of process. Admittedly there was no actual service. The order authorizing service by publication was obtained by a verified motion, which no doubt was made honestly and in good faith by plaintiffs' attorney; however, it contained a statement that was known by plaintiffs, the Williams, to be false. The affidavit was made in behalf of the Williams, and, in determining the question of the validity of the substituted service, they are answerable therefor. Their failure to disclose Weber's whereabouts to the extent of their knowledge was gross fraud on the trial court, a fraud designed to prevent, and which did prevent, Weber from receiving notice. The judgment thus obtained is void and subject to collateral or direct attack at any time. It was the duty of plaintiffs, in obtaining an order for

substituted service, to comply strictly with the rules of civil procedure and the statutes relating thereto, to the end that the defendant may have the required notice of the pendency of the action. Here, two of the plaintiffs had actual knowledge of the address of Weber, an address **368 where mail regularly reached her, and yet they permitted the court to proceed on the belief induced by their counsels' verified motion that Weber's address was unknown and could not be obtained by due diligence. Had the Williams disclosed the truth to the court, personal service outside the state could and would have been had on Weber in Chicago; or failing that, the clerk of the court could, and no doubt would, as required by law, have mailed a copy of the summons and complaint to Weber in Chicago, which it appears would have been received by Weber, as were letters sent to her by the Williams, at her known Chicago address.

The judgment in the second case, the quiet title action, purported to deprive Weber of any interest she might *275 have in the property. Here again, due process is required. In this second case, virtually the same steps were taken to obtain service as were taken in the first case. Again, the trial court was falsely informed that Weber's address was unknown, that her last known address was 'Sun Valley Ranch, Grand County, Colorado.' The clerk's record shows that on August 10, 1953, he mailed a copy of the summons and complaint to Weber at 'Sun Valley Ranch, Grand County, Colorado.' Curiously the record is silent as to what became of this letter. The affidavit of Weber is definite that she did not receive it. The evidence is undisputed that the Wil-

liams were then in possession of and living on the Sun Valley Ranch.

This court's decision in Coppinger v. Coppings, 130 Colo. 175, 274 P.2d 328, 330, is controlling in the two cases under consideration. In the Coppinger case, the plaintiff only failed to make full and fair disclosure as to defendant's whereabouts, whereas in the two cases before us there is a clear case of false statements made as to where Weber could be reached, statements made under oath denying knowledge of Weber's whereabouts and known by two plaintiffs to be false. The following language from Coppinger v. Coppinger as applicable to the situation presented by the records in these two cases:

'The second proposition presents greater difficulty, and is one which goes to the very root of the court's authority to make any orders or any valid decree whatsoever. If it be true that plaintiff in any way misrepresented the facts, either actively or merely by failure to reveal them, then it follows as a matter of course that the order directing constructive service of process by publication was invalid.

'At the outset it is pertinent to say that constructive service is in derogation of the common law making it imperative that there must be a strict compliance with every requirement of the rule or statute authorizing the same. Failure in this respect is fatal. *276 O'Rear v. Lazarus, 8 Colo. 608, 9 P. 621. Compliance with every condition of the rule or statute must affirmatively appear from the record and the motion and affidavit upon which the order for constructive service is entered takes precedence over recitals in the judgment. Ernst v. Colburn, 84

Colo. 170, 173, 268 P. 576. The law requires that personal service shall be had whenever it is obtainable. In case service may not be had either personally, or by mailing or other substituted service, then service by publication is permissible as a final and last resort. * * *.

'* * * the trial court erred for the reason that it was not incumbent upon defendant to do anything to make service of process upon him valid or regular; that the validity of the constructive service is dependent entirely upon the good faith of plaintiff and the accuracy of the statements contained in her verified motion upon which the order for publication was based; * * *. It is not a question of comparative responsibility or culpability, but one solely of whether the plaintiff in her motion for an order directing **369 service by publication was fair with the court and set forth accurately and sufficiently the true facts and surrounding circumstances.

'In the motion and affidavit the applicant must be forthright and explicit in setting forth all of the pertinent facts in order that the court may have before it the complete picture to enable correct evalation and determination of whether service by publication is justified or required under the circumstances. Anything short of the full disclosure of all known pertinent facts is designated in law as a fraud upon the court and renders void any decree thereafter entered. Medina v. Medina, 22 Colo. 146, 43 P. 1001; Morton v. Morton, 16 Colo. 3[illegible]3, 27 P. 718. To simply go through the form of legalism without a fair disclosure of existing, known facts, is of no avail.'

[4] Link to KeyCite Notes[5] Link to KeyCite

Notes Counsel for the Williams and Taber contend that Weber must have known of the pendency of the actions and therefore cannot at this late date urge that the *277 judgments be vacated because of lack of service of process. There is no evidence that she had such knowledge; even so, we find no authority holding that knowledge of the pendency of an action can be substituted for service of process. Courts acquire jurisdiction in actions in rem as well as in actions in personam by lawful service of lawful process or by voluntary appearance.

The following language, found in the 1957 Cumulative Supplement to Volume 31, Am.Jur., page 9, § 446, is applicable in these two cases.

'* * * in order that a valid judgment may be rendered in a proceeding in rem or quasi in rem, every person who has an interest in the res must have legal notice of the proceeding and an opportunity to be heard.'

In Great West Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 46, 20 P. 771, 775, a case dealing with lack of service, this court said:

'* * * It follows, as a logical result of the propositions before discussed, that a judgment rendered without service, or upon the unauthorized appearance of an attorney, is (whenever it is made to appear by proper proceedings instituted for this purpose) void, and that all sales, or other proceedings had thereunder, are, as to all persons, irrespective of notice or bona fides, absolute nullities. Shelton v. Tiffin, 6 How. 163, 12 L.Ed. 387. A different rule might prevail if a judgment is only attacked on the ground of fraud, and rights had been acquired on execution sales without notice of such

fraud. But absence of legal service or authorized appearance is jurisdictional. Without jurisdiction, no judgment whatever will be entered, nor rights acquired thereunder.'

In Sine v. Stout, 119 Colo. 254, 203 P.2d 495, 496, a motion to vacate a judgment and cancel a sheriff's deed, which had been issued pursuant to the judgment, was denied by the trial court. The reason urged in the motion to vacate was lack of service. In reversing the trial court, this court said:

*278 'The verified motion filed herein for publication of said summons contained no statement that Sine was a norresident of the state, that she had departed the state without intention of returning, or that she concealed herself to avoid service of process. It was recited in the motion that defendant Sine's whereabouts were unknown, but there was no statement that she 'cannot be served by personal service in the state.' In the absence of this mandatory requirement the motion was fatally defective and the court was without jurisdiction to proceed. The judgment and decree were consequently void and of no force or effect, and the deed a nullity. Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 115, 117 P. 1005; Millage v. Richards, 52 Colo. 512, 122 P. 788; Federal Farm Mortgage Corp. v. Schmidt, 109 Colo. 467, 126 P.2d 1036.'

**370 The trial court was in error in denying Weber's motions to vacate the judgments.

The order denying Weber's motion to vacate in Case No. 1012 is reversed and the cause remanded with instructions to vacate the foreclosure decree, cancel the sheriff's sale and deed, and to grant Weber a reasonable time to answer the com-

plaint and to proceed with the trial of the issues so presented.

The order denying Weber's motion to vacate in Case No. 1073 is reversed and the cause remanded with instructions to vacate the decree quieting title and to grant Weber a reasonable time to answer the complaint and to proceed with the trial of the issues so presented.

MOORE and KNAUSS, JJ., not participating.
Colo. 1958
WEBER v. WILLIAMS
137 Colo. 269, 324 P.2d 365